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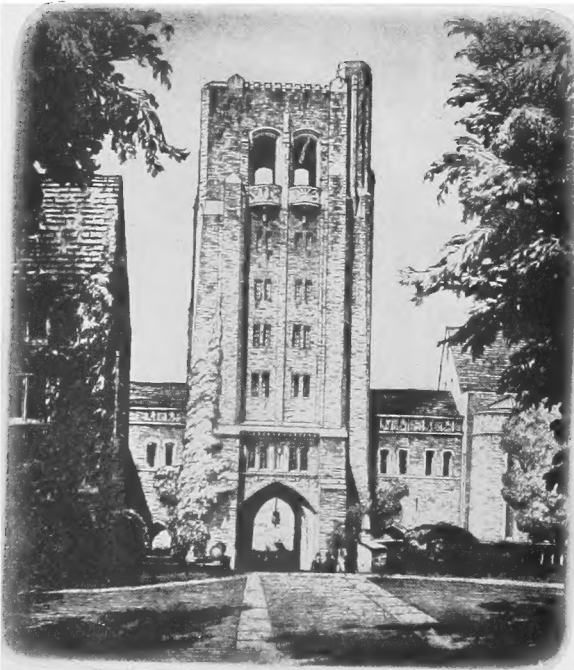
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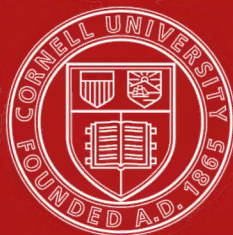


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THE LAW
OF
ACTIONABLE
MISREPRESENTATION

STATED IN THE FORM OF

A CODE

FOLLOWED BY

A COMMENTARY

AND

APPENDICES

BY

GEORGE SPENCER BOWER

ONE OF HIS MAJESTY'S COUNSEL

Author of "A Code of the Law of Actionable Defamation," &c., &c.

"Quam illa aurea : INTER BONOS BENE AGIER OPORTET ET SINE FRAUDATIONE ! At qui sint boni, et quid est bene agi, magna quæstio est."—CIC., *De Off.* III. 17.

"What shall be given unto thee, or what shall be done unto thee, thou false tongue?"—*Psal'm* cxx. 3.

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PREFACE.

It has been insisted by a courtly writer of the eighteenth century that a preface to a book is, in all cases, a seemingly concession to the ceremonial conventions and amenities, if not to the decencies, of literature. "A preface," he observes, "is part of the habit of a book, and no author can appear full dressed without it."

The convention referred to can no longer claim the universal allegiance it enjoyed in the days of Queen Anne; but it is still true to say that a preface is expected from any work which aspires to deal with a scientific or serious subject. An explanation of this demand, conceived in a spirit of sardonic gloom and somewhat overdone modesty, is given by the late Sir Leslie Stephen, when introducing to the world his *Science of Ethics*: "a preface is generally the most interesting, and not seldom the only interesting, part of the book. It is useful to the hasty critic who wishes to avoid the trouble of reading at all, and to the more serious student who wishes to have the clue to the author's speculations put into his hands at the earliest possible period." This deliverance sounds a rather harsh note, and seems gratuitously churlish to the prospective critic. The author who was accustomed to describe the *lector benevolus* as "that beast, the general reader," did not do so in a preface.

A more graceful justification of the custom is to be found in the preface to the *Examen* of Roger North, who there reflects that "it is some ease to a Reader to be advertised, first, of the design the writer proposes, and next, of the Methods he hath chosen to obtain it."

Adopting, then, this last and most simple and genial formula, and with the view to the "ease" of the reader, let me say at once that "the design the writer proposes" in this work is, as its title indicates, a statement of the law relating to misrepresentation, in so far as it is the subject of civil proceedings, whether at common law, or by statute. For a more detailed explanation of what "actionable

misrepresentation" includes, and what it excludes, I refer the "hasty critic" to the short Introductory Chapter of the Commentary, in the hope that his "haste" will not prevent him trespassing for a matter of some three pages beyond the confines of the exiguous territory assigned to him by the cynical humour of Sir Leslie Stephen.

The "methods chosen to obtain this design"—reverting again to Roger North's prescription—are these. First, the law is stated in the form of a Code. Then follows a Commentary, the first twelve Chapters of which are intended to justify and illustrate, step by step, and in the same order of treatment, the several propositions of the Code which precedes it. Marginal references to the respective Chapters and Sections of the Commentary are set opposite the successive Articles of the Code.

The plan adopted differs from that of my work on Actionable Defamation, in which the Commentary was contained in footnotes to the Code, and thus made continuous with it. There are inconveniences in the "continuous" system, which some readers have kindly pointed out to me. There may be others in the present method; but it seemed at least worth while to give it a trial.

The last three Chapters of the Commentary deal with matters which find no place in the Code, viz. Statutory Proceedings (Ch. XIII), Misrepresentation to Courts or to the State or to the public (Ch. XIV), Jurisdiction and Procedure (Ch. XV).

My original intention was to comprise in one treatise not only Misrepresentation, but Non-disclosure and Estoppel as well, since the two latter topics in some of their aspects are, with Misrepresentation, joint tenants of large tracts of English jurisprudence. But this joint tenancy was soon found to be severed as regards so many important topics that the attempt became hopelessly distracting. I was in fact aspiring to write three books at once. It requires more skill in literary equitation than I can claim to drive, troika-fashion, three horses abreast, one trotting and the others galloping. In more homely phrase, I found that I had bitten off more than I could chew. Non-disclosure, therefore, except in so far as it constitutes a form of misrepresentation [see Ch. IV, Sect. 4, Sub-s. (2)], and Estoppel, except in so far as its principles feed the law of misrepresentation with illustrations and analogies, have been thrown overboard for present purposes, perhaps to be picked up again and dealt with separately, if fates are kind—*habent sua fata libelli*—on

some future occasion. A single Horatius can only hope to overcome three Curiatii singly.

It will be noticed that the rights of shareholders and others against companies and their directors, officers, and agents, in respect of misrepresentation in prospectuses, and otherwise, constitute the subject-matter of very considerable portions of the book. Particular attention has been paid to these matters, for their importance obviously demands it. Not only are company transactions by far the most prolific in examples of the working of the principles of misrepresentation law, but they have received the special attention of the legislature, and of the courts interpreting the legislature, in regard to rectification of the register, variation of the list of contributories and the like, on the ground of misrepresentation, and also as to liquidation, which has so vital a bearing on the rights of shareholders in respect of misstatements whereby they are induced to take shares. All these matters are treated separately in their proper places [see Ch. XI, Sect. 3, Sub-ss. (3) and (4), and Sect. 4, Sub-s. (6)]. But by far the most important matter in this connection, and the one which has accordingly been subjected to the most detailed examination, is the statutory law, as to untrue statements in prospectuses, which was introduced by the Directors' Liability Act, 1890, and is now incorporated in the Companies (Consolidation) Act, 1908. This topic is minutely dealt with in Ch. XIII, Sect. 1.

The statutory provisions affecting the employment of puffers at auction sales are the subject of similarly detailed treatment in Sect. 2 of the same Chapter, whilst Sect. 3 briefly, but, it is hoped, completely, deals with other enactments relating to misrepresentation.

Chapter XIV is devoted to certain causes of action not now deemed in the strictest sense actions for misrepresentation, but which involve most of its elements, being based on misrepresentation, though that misrepresentation is not alleged to have been made to the person suing. This subject involves consideration of the remedies of a party litigant against whom a judgment has been given, or of an individual prejudiced by the grant to another of a charter or patent or privilege, where such judgment or grant has been procured by deceit practised upon the courts or the State. It also includes "passing off" cases, which indeed did once undoubtedly belong, and even in modern times have been regarded by high authorities (such

as MELLISH, L.J., and VAUGHAN WILLIAMS, L.J.—see § 417) as belonging, to the class of “actions of deceit” properly so called.

The vital questions in the consideration of any title of the law are first, the nature of the *alleganda et probanda*; next, the question on whom the burden of such allegation and proof rests in the first instance, and when and under what conditions it may be shifted; and, thirdly, the question which of the matters in dispute are matters of law, and which are matters of fact. As regards the two first of these, Lord THURLOW pertinently observed, in *Fox v. Mackreth* (1788), 12 Cox, 320, 330: “it is of very little consequence to the public to lay down definite rules of law, if you have indefinite rules of evidence”; and the paramount necessity of a clear statement of the ingredients in any cause of action, and of a sharp distinction between questions of law and fact, is implied, if not expressed, in the course of Lord HALSBURY’S eulogy on the modern rules of pleading in Scotland, and his corresponding disparagement of the English system [see *Clydesdale Bank v. Paton*, [1896] A. C. 381, at pp. 388, 389: “by the precision of the Scottish pleading there is still a necessity to set out the real cause of action . . ., which I regret to say is no longer the case in English pleadings. I therefore speak with some degree of envy when I say that, at all events, the Scottish jurisprudence has preserved something like a system in which a definite and precise allegation of the cause of action is required to be set out before a litigant is allowed to incur considerable expense in proving what may after all turn out to be no cause of action at all”].

Accordingly, in the case of every species of remedy or relief based on misrepresentation (see Chapters X, XI, and XII of the Commentary, expounding Parts VII, VIII, and IX of the Code), I have endeavoured to state definitely and separately what I conceive the law to be as to (1) the constituent elements of the cause of action or ground of defence; (2) the burden of allegation and proof; and (3) the questions of law and fact; but not until after having first considered and defined successively, in Chapters II–VIII, the various constitutive concepts in this branch of the law (representation, misrepresentation, fraud, innocence, inducement, materiality, alteration of position, damage, and parties to the representation).

The principles which govern the law of defamation are, in many cases, identical with those which are applied to the law of misrepresentation. Authorities illustrative of the one department serve frequently to elucidate the other. Accordingly my references to

these analogies have been abundant, not to say (as, I fear, it may be said) "painful, and frequent, and free." I hope it will not be considered that in these references (see §§ 47, 50, 53, 54, 68, 70, 80, 93, 94, 99, 100, 102, 108, 126, 128, 144, 162, 318, 417, 431, 450, 461, and 467) I have been too ready to detect points of contact and resemblance on the principle of Fluellen's identification of Monmouth with Macedon; or that, in citing for that purpose my work on Defamation, I have exhibited undue partiality to my own intellectual offspring. If I have sinned in this respect, I take refuge in the Aristotelian plea of the natural instinct and human tendency of literary parentage.

In the citation of authorities, I have carefully abstained from referring to judicial observations made in the course of the argument, unless those observations formed part of, or were at least consistent with, the judgment afterwards delivered; or, rather, I have abstained from relying on such observations as authoritative, or as anything more than subjects of discussion and comment. The reasons for this course are stated in note (c) to § 162, and are enforced by the vigorous protest of Bacon, V.-C., at p. 46 of *Re Great Wheal Polgooth Co.* (1883), 53 L. J. (CH). 42, against the "by no means satisfactory" practice "that words dropped by the judges in the course of discussions before them, or in the course of judgments pronounced by them, should be seized hold of, as if they were expositions of the law. They are not expositions of the law; they are not to be so treated." In a similar strain, I have heard VAUGHAN-WILLIAMS, L.J., express his strong objection to the practice, adding that, while the argument is proceeding, he is always, in a sense, *contra proferentem*. In other words, the Socratic method, than which none better has ever been discovered by mortal mind, that is, to test and prove by objection, query, and challenge (δι' ἐρωτήσεως καὶ ἀποκρίσεως ἐξερευνᾶν τὴν ἀλήθειαν), is, during the debate, as proper a function of judicature as it is of philosophy. Obviously any remark made by a judge for the purpose of this testing process does not necessarily represent his opinion even at the moment when the remark is made, still less the opinion which he is to form after the conclusion of the arguments on both sides. On the other hand, one cannot lose sight of the fact that in the reports of an earlier time, the *ars longa* was in the arguments, and the *vita brevis* in the judgments, and that the judicial dicta of those days far more commonly than at present cast their shadows before; added to which, we find in many instances that

these preliminary and interjected observations were often more pithily and epigrammatically expressed, or more apt in illustration, than the formal propositions subsequently enunciated. It is further to be remembered that there are dicta and dicta; and that the dictum of this judge may be worth more than several considered judgments of that.

Another objectionable tendency—judges being as much to blame in this case as advocates and writers—is disclosed in the imputations constantly made on the accuracy of the reporters for the purpose, as stated in note (c) to § 162, of “saving the face of some eminent authority shown to have been betrayed into the use of an indiscreet expression.” Even Lord Esher, outspoken as he usually was, on one occasion almost yielded to this temptation: “I do not think,” he says at p. 26 of *Re Terry and White’s Contract* (1886), 32 C. D. 14, C. A., “that the judgment was very satisfactory; or, if the judgment was very satisfactory, all I can say is that somebody else must take a burden which is often thrown upon judges, and that some reporter has not very satisfactorily reported what the judge said.” An example of this tendency is to be found in connection with the famous, and utterly erroneous, proposition to which Sir GEORGE JESSEL undoubtedly committed himself, that from proved materiality an inference *in law* of inducement can be made. This statement has again and again, with gross injustice to the reporters, been declared by the too idolatrous apologists of a *clarum et venerabile nomen* to be an error in the report, and not (as it was) a manifest heresy *in gremio judicis*. Many of such indiscretions are to be found in the deliverances of this distinguished judge and jurist, as was frequently pointed out in direct and emphatic terms by his successor at the Rolls, and in more urbane phrasology by BOWEN, L.J., who described him as “a great lawyer, but a rapid lawyer, and one who certainly sometimes brushed away cases in a speedy and perhaps somewhat imperious way.” He is said to have never reserved a judgment, and to have never doubted. *Hinc illæ lacrimæ*. If he had occasionally doubted, or had occasionally reserved a judgment, he would not have permitted himself those absolute, unqualified, and “imperious” statements which he undoubtedly pronounced, and for which the unfortunate reporters have been made in many cases to take the blame. One is reminded of Ben Jonson’s exclamation: “would that he had blotted a thousand!” in reference to Hemynge and Condell’s triumphant

announcement that Shakespeare “ never blotted a line,”—an exclamation which in no way detracted from the lesser poet’s admiration of the greater “ on this side idolatry ” ; just as the present observations are not offered in any spirit of detraction to the memory of Sir GEORGE JESSEL, but in justice to those at whose expense his fame has been exalted to a greater altitude than even it can justly claim.

Of the four Appendices, the first contains historical and critical matter ; the second institutes a comparison between ethics and jurisprudence in relation to misrepresentation ; the third deals with the Roman law of *Dolus*, on which many of the English principles are based ; and the fourth is devoted to a short statement of the principles of the Scottish law of misrepresentation. It did not seem proper to include the subjects of these Appendices in the Commentary ; but possibly they may be considered as not altogether without importance or relevance, if, as Dr. Wendell Holmes says at the outset of his profound treatise on *The Common Law* (Lecture I, p. 1), “ the life of the law has not been logic : it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed and unconscious, even the prejudices which judges share with their fellow men, have a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.”

When examining the principles of theological casuistry in relation to the duty of veracity, as compared with those of jurisprudence (App. B, Sect. 2), I was greatly assisted by the kindness and erudition of Father Carolan, S.J., and Father George H. Pollen, S.J. To each of these gentlemen my hearty acknowledgments are due.

G. SPENCER BOWER.

2, HARE COURT, TEMPLE.
October, 1911.

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THE LAW OF ACTIONABLE MISREPRESENTATION.

THE CODE.

[*The marginal references are to the Chapters and Sections of the
Commentary which follows the Code.*]

PART I. REPRESENTATION.

ARTICLE 1.

What Constitutes a Representation.

A REPRESENTATION is a statement made by, or on behalf of, one person (hereinafter called “the representor”) to, or with the intention that it shall come to the notice of, another person (hereinafter called “the representee.”), which relates, by way of affirmation, denial, description, or otherwise, to a matter of fact. A “matter of fact” means either an existing fact or thing, or a past event.

Ch. II.
Sect. 1.

ARTICLE 2.

Statements of Intention, etc.

A statement of the representor’s, or of a third person’s, intention, readiness, or capacity to do or abstain from doing anything, or of his expectation as to a matter *in futuro*, is a representation of the then existence of such intention, readiness, capacity, or expectation; but any statement as to a matter *in futuro* which was intended or expressed by the parties to constitute, or which can only be construed as constituting, a promise, is not a representation.

Ch. II.
Sect. 2.

ARTICLE 3.

Statements of Opinion, etc.

Ch. II.
Sect. 3. A statement of the representor's, or of a third person's, opinion, belief, or information, as such, is a statement of the fact that the representor, or such third person, entertains such opinion or belief, or is in possession of such information, as the case may be, and in that sense, and to that extent, but not further or otherwise, is a representation. A statement, as matter of fact, of that which is actually matter of opinion, belief, or information, and also a statement as matter of opinion, belief, or information, of that which is actually matter of fact, is wholly a representation.

ARTICLE 4.

Statements of Law.

Ch. II.
Sect. 4. (1) A statement of fact accompanied by, or involving, an inference or proposition of law, where such inference or proposition is not distinct or severable from the statement of fact, is wholly and for all purposes a representation.

(2) A statement of a rule, principle, or proposition of the general law, or a statement of the legal effect of facts which form the subject of another and a distinct and severable statement, or which are within the common knowledge of the parties, is a representation in the same sense and to the same extent as in Article 3 mentioned with reference to statements of opinion, but not further or otherwise.

ARTICLE 5.

Statements as to Documents.

Ch. II.
Sect. 5. A statement as to
 (a) the existence, or
 (b) the actual contents, or
 (c) the effect, object, or purpose, or
 (d) the nature, character, class, or description,
 of any document, is a representation.

ARTICLE 6.

Statements in the Nature of General Commendation, Puffing, Exaggeration, etc.

Ch. II.
Sect. 6. Mere general vaunting, puffing, or commendation of the merits or value of any person or thing, or mere exaggeration,

unaccompanied by any particular or definite statement, is not a representation.

ARTICLE 7.

How a Representation may be Made.

A representation may be made in express terms, or may be implied, as hereinafter stated. Ch. III.

ARTICLE 8.

Express and Implied Representations.

(1) An express representation is a representation which is made either Ch. III.
Sect. 1.

(a) in writing, or by equivalent permanent signs ; or

(b) orally, or by gestures or other transitory signs.

(2) An implied representation is a representation which is implied, either Ch. III.
Sect. 2

(a) from an express statement or statements, as in Articles 2, 3, and 4 mentioned, or in accordance with the Rules of construction contained in Article 12 ; or

(b) from acts and conduct.

ARTICLE 9.

Continuing Representations.

In any case where there is an interval between the representation and the alteration of position induced thereby, the representor is at liberty to withdraw or modify the representation at any time during such interval. Unless so withdrawn or modified, and, if modified, subject only to the modification, the representation is deemed to be repeated at each successive moment during the whole of such interval, and is hereinafter called " a continuing representation." Ch. IV.
Sect. 3.

PART II.

MISREPRESENTATION.

ARTICLE 10.

What Constitutes Misrepresentation.

A misrepresentation is a representation which, when made, or (in the case of a continuing representation) when acted upon by the representee, was false. Ch. IV.
Sects. 1, 3.

ARTICLE 11.

What Constitutes Falsity.

Ch. IV. A representation is false when there is a substantial
Sects. 1, 2. discrepancy between it and any material fact which it expressly or impliedly purports to state. A discrepancy is substantial when it would be deemed material by any normal representee in the circumstances of the individual case.

ARTICLE 12.

Canons of Construction.

Ch. IV. The following are rules for the determination of the falsity
Sect. 4. or truth of any representation :—

Ch. IV. *Rule 1.*—The meaning of any representation is that
Sect. 4. which was thereby conveyed to the mind of the
Sub-s. (1). representee, and, in the absence of special circumstances, the meaning deemed to have been so conveyed is the natural and ordinary meaning (hereinafter called “the primary sense”) of the words or other signs used : provided that it is competent to either party to allege, in which case the burden is on such party of proving, special circumstances in virtue of which the representee in fact understood the representation in a sense other than the primary sense (hereinafter called a “secondary sense”). Where the representation is susceptible of more than one primary sense, the burden is on the representee of alleging and proving in which of such possible senses he understood it, and that in that sense it was false : provided nevertheless, that where there is other and independent evidence that the representor used ambiguous language or other signs for the express purpose of misleading, the burden is on the representor of proving that the representee in fact understood it in some one of such possible senses in which it was true.

Ch. IV. *Rule 2.*—Where a representation, by reason of the
Sect. 4. omission therefrom of all reference to qualifying conditions, subject to which alone it would be true, or
Sub-s. (2). by reason of the representor’s suppression of facts which in the circumstances of the individual case it

was his duty to disclose, is rendered a partial, fragmentary, incomplete, or misleading representation of the entirety of the facts to which it relates, it is deemed false, notwithstanding that the statement, or each of the statements, if more than one, made by the representor may be, when taken by itself, literally accurate. Except as aforesaid, silence or reticence is not a misrepresentation.

Rule 3.—In the case of a representation which is compounded of several connected statements, or contained in several connected documents, the question to be determined is whether, in the primary, or in any alleged and proved secondary, sense (as the case may be) of the entirety of such statements or documents, in their bearing upon and relation to one another, such representation is false or true, and not whether any particular one of such statements or documents is false or true, unless it is complete and intelligible in itself, and neither incorporates by reference, nor purports to qualify, any other of such statements or documents.

Ch. IV.
Sect. 4.
Sub-s. (3).

Rule 4.—The question whether the representation in any case is or is not capable of any primary or (as the case may be) secondary meaning alleged, is a question of law. Further, the question of the primary sense of any representation the terms of which are wholly in writing or undisputed, is a question of law. All other questions as to the meaning conveyed to the representee by any representation are questions of fact.

Ch. IV.
Sect. 4.
Sub-s. (4)

PART III.

MISREPRESENTATION IN RELATION TO THE MIND OF THE REPRESENTOR.

ARTICLE 13.

What Constitutes Fraud in Misrepresentation.

A fraudulent misrepresentation is a misrepresentation which, when made, or (in the case of a continuing representation) when acted upon by the representee, the representor did not in fact honestly believe to be true.

Ch. V.
Sect. 1.
Sub ss. (1)
and (2).

ARTICLE 14.

Motive of Representor Irrelevant.

Ch. V.
Sect. 1.
Sub-s. (3). For the above purpose, it is immaterial whether the representor, in making the misrepresentation, had or had not any intention to deceive, defraud, or injure the representee or any other person, or to benefit himself or any other person, or what, if any, was his motive for making the same.

ARTICLE 15.

What Constitutes Innocence in Misrepresentation.

Ch. V.
Sect. 2.
Sub-s. (1). An innocent misrepresentation is a misrepresentation which, when made, or (in the case of a continuing representation) when acted upon by the representee, the representor did in fact honestly believe to be true.

ARTICLE 16.

Unreasonableness or Negligence not Fraud.

Ch. V.
Sect. 2.
Sub-s. (2). An innocent misrepresentation is not rendered fraudulent by the mere fact that the belief of the representor was unreasonable, or was based upon inadequate materials, information, or inquiry, or arose from negligence, forgetfulness, inadvertence, or incompetence.

PART IV.

MISREPRESENTATION IN ITS EFFECT ON THE REPRESENTEE.

ARTICLE 17.

Inducement.

Ch. VI.
Sect. 1. The representee is deemed to have been induced to alter his position by the representation, if he was, and was intended by the representor to be, influenced in so doing by his belief in the truth thereof. Provided that—

- (i) If inducement be proved as a fact, it is not necessary to show that the representation was the sole inducement, or that, but for his belief in the truth thereof, the representee would not have altered his position in the manner alleged :

- (ii) In the case of a number of connected representations, or a representation compounded of a number of statements, it is sufficient to prove that the representee was induced to alter his position by his belief in the truth of such representations or statements in their entirety, and it is not necessary to prove that he was separately induced by any particular one or more of them :
- (iii) It is sufficient to prove that the representee relied upon some one or more of several representations or statements not so connected as aforesaid :
- (iv) Where the representation relied upon is not reasonably capable of more than one primary sense, it is necessary and sufficient to prove that the representee was induced by it in that sense. Where the representation is so capable, the representee must specify the sense in which he alleges that he understood it, and prove that he was induced by it, in that sense, to alter his position. It is nevertheless competent to the representee to allege and prove that the representor intended him to, and that he did, assign a secondary sense to the representation, and that he was induced by it, in that sense, to alter his position.

ARTICLE 18.

Materiality.

A material representation is a representation the tendency, or the natural and probable effect, of which, either in the ordinary course of events, or in special circumstances of the case known to the representor, was to induce the representee to alter his position in the manner alleged.

Ch. VI.
Sect. 2.

ARTICLE 19.

Questions of Fact and Law in Relation to Inducement and Materiality.

(1) It is a question of law whether there is any evidence of the alleged inducement, and also whether the proved or admitted representation is capable of being considered material, or of a sense in which it can be so considered.

Ch. VI.
Sect. 3.

Subject to the above, all questions in relation to inducement and materiality are questions of fact.

(2) Inducement and materiality are separate and distinct facts, and must be proved independently: provided that inducement may be inferred, as a fact, from proved materiality of a sufficiently obvious character to justify such an inference: but it cannot be so inferred as a conclusion of law.

ARTICLE 20.

Alteration of Position.

Ch. VII.
Sect. 1.

A representee is deemed to have altered his position on the faith of a representation when he was induced by his belief in the truth thereof to become a party to any contract or transaction either with the representor or with a third person, or to do, or abstain from doing, any act of whatsoever nature which he was not compelled by law to do, or abstain from doing. "Transaction" herein means and includes any act done, or relationship established, between two persons, which is of a binding or irrevocable nature, though it may not of itself amount in law to a contract.

ARTICLE 21.

Damage.

Ch. VII.
Sect. 2.

A representee is deemed to have sustained damage by reason of his belief in the truth of a representation,—(i) when any alteration of position induced thereby has, either in the ordinary course of events, or as the consequence actually foreseen and intended by the representor, resulted in loss to the representee of money, or money's worth, or in any temporal detriment, or physical injury; or (ii) when, without having so altered his position, the representee has in fact suffered personal and physical injury in consequence of such belief.

PART V.

PARTIES TO THE REPRESENTATION.

ARTICLE 22.

The Representor.

Ch. VIII.
Sect. 1.

A "representor" means and includes—

(i) Any person who actually and personally made the

representation ; provided that, where several persons concurred or combined in making it, all such persons are deemed joint representors, and, in the case of a fraudulent misrepresentation, joint and several representors :

- (ii) Any person, whether principal or partner of the actual representor, by whose express or implied authority the representation was made ; provided that, in case of a misrepresentation, whether fraudulent or innocent, principal and agent are deemed one person, and it is immaterial whether the principal only, or the agent only, or both, had the fraudulent mind (where fraud is alleged), or whether the principal was a natural person, or a body corporate or politic :
- (iii) Any principal, by whose sub-agent the representation was made, if, but not unless, it was in the ordinary course of business, or was contemplated, or was necessary in the circumstances of the case, that the immediate agent should delegate any of the duties of his agency, and the sub-agent when making the representation, was acting within the scope of any duty so delegated ; provided that a co-agent of any agent who made the representation is not, merely as such, deemed a representor.

ARTICLE 23.

The Representee.

A “representee” means and includes—

Ch. VIII.
Sect. 2.

- (i) Any person to whom the representation was actually and personally made :
- (ii) Any principal, or partner, of such person :
- (iii) Any other person to whom the representor intended that the representation should be, and to whom in fact it was, transmitted or communicated :
- (iv) In the case of a representation made or addressed to the public or a class,—any member of the public, or of such class, to whose notice it came, and who acted upon it.

PART VI.

WHEN MISREPRESENTATION IS ACTIONABLE.

ARTICLE 24.

When Subject of Action for Damages.

- Ch. IX.
Sect. 1. Fraudulent misrepresentation is the subject of an action for damages, in accordance with the provisions of Part VII.

ARTICLE 25.

When Subject of Proceedings for Rescission, or Ground of Defence.

- Ch. IX.
Sect. 2. Where the representee's alteration of position consisted in becoming party to a contract or transaction with the representor, the misrepresentation, whether fraudulent or innocent, is the subject of proceedings for rescission, and a ground of affirmative defence to any action to enforce such contract or transaction, pursuant to the provisions of Parts VIII. and IX. respectively.

ARTICLE 26.

To what Proceedings Statutory Misrepresentation is Amenable.

- Ch. XIII. Where misrepresentation is the subject of any statute or enactment, it is actionable under the conditions, and amenable to the several proceedings, mentioned in such statute or enactment, and not otherwise.

ARTICLE 27.

When Innocent Misrepresentation not Actionable.

- Ch. IX.
Sect. 3. Except as aforesaid, innocent misrepresentation is not, as such, the subject of any civil action, proceedings, or liability whatsoever.

PART VII.

ACTION FOR DAMAGES FOR MISREPRESENTATION.

ARTICLE 28.

Constituent Elements of the Cause of Action.

An action may be maintained for damages for misrepresentation under the following conditions. It is necessary and sufficient, in order to establish the plaintiff's right to relief in any such action, to allege, with such particulars as are reasonably adequate to the requirements of the individual case, and, having alleged, to prove (except in so far as any allegation may be expressly or impliedly admitted at or before the trial) each and every of the following matters :—

Ch. X.
Sect. 1.

- (i) That the alleged representation was in fact made, and was a representation within the meaning of Part I. :
- (ii) That the defendant was the representor within the meaning of Article 22, or is otherwise liable for the representation within the meaning of Article 32 :
- (iii) That the plaintiff was the representee within the meaning of Article 23, or is otherwise entitled to sue in respect of the representation within the meaning of Article 32 :
- (iv) Inducement and materiality, within the meaning of Articles 17 and 18 respectively :
- (v) Falsity of the representation at the material date, within the meaning of Articles 10, 11, 12 :
- (vi) That the representation was fraudulent at the material date, within the meaning of Articles 13 and 14 :
- (vii) Alteration of position, and resultant damage, or physical and personal injury, within the meaning of Articles 20 and 21.

ARTICLE 29.

Affirmative Defences.

It is competent to the defendant in any such action, with or without a denial of all or any of the plaintiff's allegations, to set up any one or more of the affirmative defences available to a defendant in any action of tort, and also any one

Ch. X.
Sect. 2.

or more of the affirmative defences special to actions for damages for fraudulent misrepresentation: provided that the burden is on such defendant of alleging, with such particulars as are reasonably adequate to the requirements of the individual case, and, having so alleged, of proving, all such matters as are necessary to establish the defence or defences so set up. Such special affirmative defences are as follows:—

Ch. X.
Sect. 2.
Sub-s. (1).

(i) That, at the date of the representation, or before altering his position on the faith thereof, the plaintiff had acquired exact and complete knowledge of the truth in relation to the facts alleged to have been misrepresented: provided that proof that the plaintiff had the means of acquiring such knowledge does not of itself constitute any defence:

Ch. X.
Sect. 2.
Sub-s. (2).

(ii) That the plaintiff had expressly, or (by his acts and conduct) impliedly, agreed to waive all inquiry into the subject-matter of the representation, and to dispense with, or not to rely upon, any information, or facilities for investigation, given or offered by the defendant; or had expressly agreed to take any property purchased from the defendant with all faults, or at his own risk, or with such title thereto as the defendant could give, or on the basis of an express refusal by the defendant to give any warranty: provided, nevertheless, that none of the foregoing facts constitute any defence in any case where it is shown that the representor had fraudulently concealed any such fault, risk, or defect of title, by active devices or positive means: provided also that any stipulation between the parties that the representor shall not be liable for fraudulent misrepresentation is a nullity:

Ch. X.
Sect. 2.
Sub-s. (3).

(iii) In any case in which the plaintiff's alteration of position consisted in becoming a party to a contract or transaction with the defendant,—that the plaintiff had, before action, avoided such contract or transaction; but not merely that he was in a position to avoid it:

Ch. X.
Sect. 2.
Sub-s. (4).

(iv) In any case in which the representation was as to the credit of a third person,—that the representation

was not in writing, or, if in writing, was not personally signed by the representor, within the meaning of sect. 6 of the Statute of Frauds Amendment Act, 1828 :

- (v) In any case in which the representation was made by a person acting within the scope of his employment by, or partnership with, the defendant, but not with his express authority,—that it was made by such person for his own, or another's, private ends, and not for the intended or actual benefit of the defendant.
- Ch. X.
Sect. 2.
Sub-s. (5).

ARTICLE 30.

Nature and Quantum of Relief.

A plaintiff who succeeds in any action for damages for fraudulent misrepresentation is entitled to recover, as such damages, the then present money value of the whole of the net loss, damage, or injury which has resulted, or will result, within the meaning of Article 21, from his having altered his position, in the manner alleged and proved, on the faith of the fraudulent misrepresentation. The following are rules for the ascertainment and computation of such damages :—

Ch. X.
Sect. 3.

- (i) Where the plaintiff's alteration of position consisted in becoming a party to any contract or transaction with the defendant, or with a third person, the sum recoverable as damages in the amount of the excess (if any) of all moneys paid or payable, and the money value (if any) of all property transferred or transferable, by the plaintiff under such contract or transaction, over and above the total of all moneys (if any), and the money value (if any) of all property, received or receivable by him thereunder : provided that the money value of property received or receivable by the plaintiff means the real value which such property had, in the proved circumstances of the case, immediately after the conclusion of such contract or transaction :
- (ii) Where the plaintiff's alteration of position consisted in the bestowal of time, services, or labour, the

sum recoverable is the money value thereof on a fair estimate in all the circumstances of the case :

- (iii) Where the plaintiff's alteration of position consisted in the incurring of any liability, which has not been discharged at the date of the trial, the sum recoverable is the estimated then present money value thereof :
- (iv) Where the plaintiff's alteration of position consisted in the doing of or abstaining from some act, in consequence of which he has sustained physical and personal injury, or where he has sustained such injury in consequence of his belief in the truth of the representation, without having altered his position as abovementioned, the sum recoverable is that which would be recoverable if the plaintiff were suing for damages for personal injuries caused by negligence.

ARTICLE 31.

Questions of Law and Fact.

Ch. X. In any action for damages for fraudulent misrepresentation,
Sect. 4. the following are questions of law :—

- (i) Whether the alleged, or proved, representation is a representation in law, within the meaning of Articles 1-6 :
- (ii) Whether the alleged, or proved, representation is capable of the meaning assigned to it by either party :
- (iii) Whether the alleged, or proved, representation is capable of being deemed material, within the meaning of Article 18 :
- (iv) Whether, in the case of an affirmative defence of the kind maintained in Article 29 (iv), the alleged, or proved, representation relates to the credit of a third person, or to any of the other matters referred to in sect. 6 of the Statute of Frauds Amendment Act, 1828 :
- (v) Whether the damages claimed are recoverable in law, and all questions as to the proper measure of damages :

- (vi) Generally, in the case of any of the necessary allegations on the part of the plaintiff, or of the defendant, as stated in Articles 28 and 29 respectively, whether there is any evidence thereof, or whether, *prima facie* evidence of any such allegation having been adduced, there is any evidence to the contrary thereof.

Except as aforesaid, all disputed questions are questions of fact.

ARTICLE 32.

Parties to the Action.

(1) Any representee, within the meaning of Article 23, or any person who, in virtue of the rules of common law or any statutory provision relating to parties to actions of tort in general, is entitled to stand in the place of such representee, in case of his death, disability, incapacity, or otherwise, may maintain an action or counterclaim for damages for fraudulent misrepresentation; and any representor, within the meaning of Article 22, or any person who, in accordance with any such rule or statutory provision, is required to stand in the place of such representor, in case of his death, disability, incapacity, or otherwise, is liable to be sued in such action, or proceeded against by such counterclaim. In the foregoing Articles of this Part, the expression "plaintiff" includes a party so counterclaiming, and, where the action or counterclaim is brought, not by the representee, but by some person in right of him or his estate, it means such representee only: and the expression "defendant" in like manner includes a party resisting such counterclaim, and where the action or counterclaim is brought, not against the representor, but against a person required to stand in his place, it means such representor only.

Ch. X.
Sect. 5.
Sub-ss.
(1), (2).

(2) A bare right to sue for damages for fraudulent misrepresentation is not assignable *inter vivos*.

Ch. X.
Sect. 5.
Sub-s. (1).

(3) An action or counterclaim against a corporation or firm for damages in respect of any fraudulent misrepresentation, whereby the plaintiff alleges that he was induced to become a member thereof, is not maintainable whilst the plaintiff remains such member.

Ch. X.
Sect. 5.
Sub-s. (3).

PART VIII.

PROCEEDINGS FOR RESCISSION OR ANALOGOUS RELIEF.

ARTICLE 33.

Nature and Limits of the Right to avoid a Contract or Transaction induced by Misrepresentation.

Ch. XI.
Sect. 1,
and Sect.
3, sub-s.
(6).

Where a representee has been induced to enter into a contract or transaction with the representor by any misrepresentation on the part of such representor, the contract or transaction, whether the representee has, or has not, sustained, or is, or is not, likely to sustain, damage by reason of his having entered into it, and whether the misrepresentation was fraudulent or innocent, is voidable at the option of the representee, on discovery of the truth of the facts misrepresented, but remains valid and binding unless and until he elects to repudiate it (not having previously in words, or by acts and conduct, elected to affirm it), and gives notice of such repudiation to the representor. On such notice being given, if the representor refuses to accept or recognize the repudiation, or to treat the contract or transaction as at an end, the representee is entitled to enforce his avoidance by any of the proceedings in Articles 35-38 mentioned, subject to the conditions stated in Article 34: provided that, without resort to any such proceedings, he is entitled to resume physical possession of any property delivered under the contract or transaction, if and when he becomes in a position to do so without violating the rights of any third person. The avoidance must be of the entire contract or transaction; provided that the representee is entitled to avoid a particular term or part thereof, without avoiding the residue, or to avoid it as against one of the parties thereto, without affecting the rights or liabilities thereunder of any other party, if, but not unless, such term or part is wholly distinct and recoverable from such residue, or if, but not unless, the party against whom it is sought to avoid the contract or transaction is a party severally liable thereunder.

ARTICLE 34.

What must be alleged and proved by the Representee in any Proceedings for Rescission or Analogous Relief.

In any of the proceedings mentioned in the next Article for the purpose of obtaining a judicial rescission or avoidance of any contract or transaction induced by misrepresentation, or for analogous relief, it is necessary and sufficient, in order to establish the plaintiff's right to such relief, to allege, with such particulars as are reasonably adequate to the requirements of the individual case, and (except so far as any allegation may be expressly or impliedly admitted at or before the trial) to prove, each and every of the following matters :—

Ch. XI.
Sect. 2.

- (i) That the alleged representation was in fact made, and was a representation within the meaning of Part I :
- (ii) That the defendant was the representor within the meaning of Article 22, or is otherwise liable for the representation within the meaning of Article 41 (2) :
- (iii) That the plaintiff was the representee within the meaning of Article 23, or is otherwise entitled to maintain the proceedings, within the meaning of Article 41 (1) :
- (iv) That the plaintiff in fact entered into the contract or transaction sought to be rescinded, and that he was induced to do so, within the meaning of Article 17, by the alleged representation, being a material one, within the meaning of Article 18 :
- (v) Falsity of the representation at the material date, within the meaning of Articles 10, 11, and 12 :
- (vi) That the alleged contract or transaction is in law subsisting and binding, and is still voidable at the plaintiff's instance, or by the Court : that is to say, that it was concluded ; and, having been concluded, has never been put an end to by mutual consent, forfeiture, or otherwise ; and that it is still executory, and has not been completely executed on both sides by conveyance or otherwise, unless the misrepresentation was fraudulent, or was a misrepresentation of the entire substance, nature or essence of the

subject-matter of the contract, in either of which cases such complete execution is immaterial; provided that a contract or transaction induced by a misrepresentation as to the entire nature, character, or class thereof, or as to the identity of the person with whom it purported to have been entered into, is not voidable, but void :

- (vii) That the alleged contract or transaction was one which in law created and affected contractual rights and liabilities only.

ARTICLE 35.

Action for Rescission.

Ch. XI. On allegation of the several matters set forth in Article
Sect. 3. 34, the representee may maintain an action for the rescission
Sub-ss. (1) of the contract or transaction, wherein he is entitled to claim,
and (5). and, on proof of such matters, to obtain, the following
remedies, or such of them as may be appropriate to the
circumstances of the particular case :—

- (i) A declaration that the contract or transaction is void, and that it is to be treated as having been void since his repudiation thereof :
- (ii) An order for rescission or annulment of the contract or transaction *ab initio*, in its entirety, or under the conditions mentioned in Article 33, but not otherwise, partially ; provided that, in a proper case, any instrument purporting to contain or record the contract or transaction may be set aside in one character, or for one purpose, and allowed to stand in another character, and for another purpose : provided also that the mere fact that the contract sought to be rescinded was a contract for the purchase of property sold under the direction of the Court in any cause or matter, in no way affects the title of the representee to rescission : but in that case his remedy is not by action, but by application to the Court directing the sale in such cause or matter :
- (iii) An order for the cancellation, or delivering up to be

cancelled, of any instrument or document purporting to contain or record the contract or transaction, where there is an appreciable danger that, if allowed to remain in the defendant's possession, it may, though judicially declared void, be negotiated (if negotiable), or used thereafter for the purpose of harassing the plaintiff by frivolous and vexatious proceedings, or, so as otherwise to injuriously affect the plaintiff's title or rights :

- (iv) Where the contract sought to be rescinded was a contract to take shares in a company, within the meaning of the Companies (Consolidation) Act, 1908,—an order for the rectification of the register of members :
- (v) An order for the repayment to the plaintiff (with interest, in the absence of special circumstances) of all moneys, and the retransfer to him of all property, received by the defendant under the contract or transaction, together with all rents, profits, dividends, and benefits received in respect of such property (less the cost of any permanent improvements thereto in the case of real property), as against the like repayment and retransfer by the plaintiff to the defendant of all moneys and property (if any) received by the plaintiff thereunder, and payment of all rents, profits, dividends, and benefits received by him in respect of such property :
- (vi) Where necessary, an indemnity against any liability of the plaintiff to third persons under the contract or transaction :
- (vii) Where necessary, an injunction restraining the defendant from dealing or parting with any property the subject of the contract or transaction :
- (viii) Payment, by way of indemnity, of the amount of any expenses or liabilities incurred by the plaintiff in relation to the property the subject of the contract or transaction, and pursuant thereto, during the period when he was in possession of the property :
- (ix) Generally, all such directions for inquiries, accounts, or otherwise, as may be necessary for the purpose of effecting a restoration of the *status quo*, and

mutual restitution *in specie* of all moneys, property, and benefits acquired by the parties under the contract or transaction.

ARTICLE 36.

Action for Money Had and Received.

Ch. XI. Where the representee has paid money to the representor
Sect. 3. pursuant to the contract or transaction, and has received
Sub-s. (2). from him no money or money's worth thereunder, he is entitled to recover what he has so paid in an action for money had and received, on proof of the matters set forth in Article 34.

ARTICLE 37.

Statutory Proceedings for Rectification of the Register of Members of a Company.

Ch. XI. Where the representee alleges that he was induced by
Sect. 3. the misrepresentation of a company, within the meaning of
Sub-s. (3). the Companies (Consolidation) Act, 1908, to agree to become a shareholder therein, or where the representee is such a company, and alleges that it was induced by the misrepresentation of a shareholder to accept and register another person as the transferee of his shares, it is competent to the representee, in either of such cases, to apply to the Court for rectification of the register of members of the company in the summary manner provided by sect. 32 of the said statute, instead of by action, unless, in the discretion of the Court, such summary proceedings are deemed inconvenient and inappropriate to the circumstances of the case.

ARTICLE 38.

Proceedings for Variation of the List of Contributories of a Company in Liquidation.

Ch. XI. In any such case as that mentioned in the last Article,
Sect. 3. if the company is in liquidation, the application must be
Sub-s. (4). made in the winding up of such company, pursuant to sects. 163, and 173, of the Companies (Consolidation) Act, 1908, to vary the list of contributories by striking out the applicant's name therefrom, on which application the Court has

jurisdiction also to rectify the register of members. No contributory is entitled to an order on such application except subject to the conditions stated in Article 39 (vi).

ARTICLE 39.

Affirmative Defences to Proceedings for Rescission.

It is competent to the defendant in any proceedings for rescission, with or without a denial of all or any of the plaintiff's allegations, to set up any one or more of the affirmative defences available to a defendant in any action of contract, and also any one or more of the affirmative defences special to proceedings for the rescission of contracts and transactions on the ground of misrepresentation: provided that the burden is on such defendant of alleging, with particulars reasonably adequate to the requirements of the individual case, and, having so alleged, of proving, all such matters as are necessary to establish the defence or defences so set up. Such special defences are as follows:—

- (i) The affirmative defence set forth in Article 29 (i), subject to the proviso therein stated: Ch. X.
Sect. 2.
Sub-s. (1).
- (ii) The affirmative defence set forth in Article 29 (ii), subject to the provisos therein stated: Ch. XI.
Sect. 4.
Sub-s. (2).
- (iii) In the case of any contract of purchase and sale,—that the plaintiff had expressly agreed to accept compensation in lieu of rescission in respect of any misrepresentation as to the property the subject of such contract: provided that such agreement constitutes no defence in any case where it is proved that the misrepresentation was fraudulent, or that it was a misrepresentation of the entire substance and nature of the property, or where the compensation does not admit of pecuniary assessment: Ch. XI.
Sect. 4.
Sub-s. (3).
- (iv) That by express agreement, or impliedly by acts and conduct, or by inaction, the plaintiff, with full and precise knowledge of all the material facts, had elected to affirm, and adhere to, the contract or transaction sought to be rescinded: Ch. XI.
Sect. 4.
Sub-s. (4).
- (v) That it has become physically, commercially, or legally impossible to restore the parties to the Ch. XI.
Sect. 4.
Sub-s. (5).

position in which they were before the contract or transaction was entered into, or impossible to do so without injustice to innocent third parties who have acquired rights thereunder for value, or without injustice to the defendant :

Ch. XI.
Sect. 4.
Sub-s. (6).

- (vi) Where the defendant is a company within the meaning of the Companies (Consolidation) Act, 1908, and the contract sought to be rescinded is a contract to become a member thereof,—that the company is in liquidation, whether voluntary, compulsory, or under the supervision of the Court : provided that it is competent to the plaintiff to displace such *primâ facie* defence by proof that before the commencement of such liquidation he had not only given the company notice of his repudiation of the contract, but had effectively avoided the same by a binding agreement for that purpose with the company, or had commenced proceedings against the company for rescission thereof, or had agreed with the company to be bound by the result of a test action or proceeding against the company on the part of some other person for the like purpose, and based on the same misrepresentation ; or that, before the commencement of the liquidation, the contract had been in fact determined by forfeiture of his shares, or otherwise, or that it was void *ab initio*, and not merely voidable, or had never been a concluded contract at all.

ARTICLE 40.

Questions of Law and Fact.

Ch. XI.
Sect. 5.

In any proceedings for rescission, the following are questions of law :—

- (i) Whether the alleged, or proved, representation is a representation in law, within the meaning of Articles 1–6 :
- (ii) Whether the alleged, or proved, representation is capable of the meaning assigned to it by either party :
- (iii) Whether the alleged, or proved, representation is

capable of being deemed material, within the meaning of Article 18 :

- (iv) Whether, in the proved or admitted circumstances of the case, it is, or is not, legally possible to restore the parties to their former position :
- (v) Whether the contract or transaction is voidable, or void ; and whether it was ever a concluded contract, or had been lawfully determined :
- (vi) Generally, in the case of any of the necessary allegations on the part of the plaintiff, or of the defendant, —whether there is any evidence thereof, or whether, *primâ facie* evidence of any such allegation having been adduced, there is any evidence to the contrary thereof.

Except as aforesaid, all disputed questions are questions of fact.

ARTICLE 41.

Parties to the Proceedings.

- (1) The persons entitled to institute any of the proceedings in this Part mentioned, are the following :— Ch. XI.
Sect. 6.
Sub-s. (1).
 - (a) Any representee within the meaning of Article 23 :
 - (b) Any person who, in virtue of the rules of common law or any statutory provision relating to parties to actions of contract in general, is entitled to stand in the place of such representee, in case of his death, disability, incapacity, or otherwise :
 - (c) Any person who, by assignment or devolution, has acquired property to which the contract or transaction relates, and who is accordingly deemed to have at the same time acquired such equities to avoid or rescind the same as his predecessor in title had : provided, nevertheless, that a bare right to rescind is not assignable.

Any person entitled to sue, or to make an application to the Court, for any of the remedies in this Part mentioned, may also counter-claim or make a cross-application therefor. In the foregoing Articles of this Part, the expression “ plaintiff ” includes a person so counter-claiming, applying, or making such cross-application. Where such action, counter-claim, application, or cross-application is brought, set up,

or made, not by the representee, but by some person in right of him or his estate, the said expression is intended to apply to such representee only.

Ch. XI. (2) The persons against whom any of the proceedings
Sect. 6. in this Part mentioned may be instituted are the following :—
Sub-s. (2).

- (a) Any representor, within the meaning of Article 22 :
- (b) Any person who, in accordance with the rules of common law or any statutory provision relating to parties to actions of contract in general, is required to stand in the place of such representor, in case of his death, disability, incapacity, or otherwise :
- (c) Any assignee of a chose in action from a representor who acquired the same under the contract or transaction sought to be rescinded :
- (d) Any assignee of property in possession from a representor who acquired the same under the contract or transaction, if, but not unless, the property was assigned after the representor had avoided such contract or transaction, or if such assignee took the property otherwise than for value, or with notice of any circumstances rendering the contract or transaction voidable, or in bad faith.

The expression “defendant,” in the foregoing Articles of this Part, includes a person resisting any such counterclaim, application, or cross-application as aforesaid. Where the proceeding is brought, not against the representor, but against a person defending in right of him or his estate, the said expression is intended to apply to such representor only.

PART IX.

RELIEF BY WAY OF DEFENCE TO AN ACTION OR PROCEEDING TO ENFORCE THE CON- TRACT OR TRANSACTION.

ARTICLE 42

When Misrepresentation may be set up as a Defence.

Ch. XII. Where any action, or other proceeding of whatsoever
Sect. 1. kind, is instituted by one of the parties to a contract for the

purpose of enforcing the same, whether specifically or otherwise directly, or for the recovery of damages for the breach thereof, or for an injunction, or otherwise for the purpose of indirectly enforcing the same, it is competent to the party against whom the proceeding is instituted to set up as a defence or answer thereto, with or without any cross-claim for rescission, that he was induced to enter into the contract by the misrepresentation of the party seeking to enforce it.

ARTICLE 43.

What must be proved to establish the Defence or to Defeat it.

The defence or answer is established by allegation and proof of all matters required to establish a right to rescission, as stated in Article 34, and of the further fact that, on discovering the truth, the representee repudiated the contract, and has never since recognized it as valid, or taken any benefit thereunder: provided that, where the action is for specific performance, the representee is only required to establish such of the said matters as may be sufficient, in all the circumstances of the particular case, to satisfy the Court, in its discretion, that the special remedy is not appropriate, and to refuse accordingly to grant it, either absolutely, or except upon terms. It is competent to the representor to resist such defence or answer by allegation of any of the matters stated in Article 39, and, on proof of the same, the defence or answer is invalidated. Article 40 (as to questions of law and fact), and Article 41 (as to parties), in respect of proceedings for rescission, apply *mutatis mutandis* to the defences and answers in this Part referred to, with the following variation in the case of Article 41, viz. that, where the defence or answer is set up against an action or other proceeding instituted by an indorsee or transferee of a negotiable instrument, it is sufficient in the first instance to allege and prove that such negotiable instrument was obtained from the person setting up the defence or answer by the misrepresentation of some person through whom the plaintiff claims, whereupon the burden of proof is shifted, and it is incumbent on the plaintiff, in order to invalidate the defence or answer, to establish

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affirmatively that he acquired title to the instrument for value, without notice, and in good faith.

[NOTE.—It has not been thought necessary or advisable to include in this Code any of the matters which are the subject of Chapters XIII, XIV, and XV.]

THE COMMENTARY.

CHAPTER I.

INTRODUCTORY.

SECT. 1. SCOPE OF THE TREATISE.

1. THIS Commentary, and the Code which it is designed to justify and illustrate, are concerned with misrepresentation only so far as it conduces to acts, or abstention from action, on the part of the person to whom it is addressed, whereby his position is altered, and only so far as it confers upon that person a right to civil remedy and relief. So much, indeed, appears from the title itself, which indicates substantially which of the topics, more or less connected with statements made by one person to another, are excluded from, and which on the other hand fall within, the scope of this treatise.

SECT. 2. EXCLUDED TOPICS.

2. A representation, and a promise, are mutually exclusive of, and antithetical to, one another. In the case of a statement which has formed the inducement to another's alteration of position, there is no question of any contractual engagement having been violated: whereas in the case of a contract, or term or condition of a contract, or warranty, the sole question is, breach or no breach; and the application of the terms "false" or "true," except in a highly metaphorical sense, to such breach or observance, would be inapposite and grotesque (*a*).

3. "Misrepresentation" also excludes "mistake," which imports a self-induced misapprehension, either on the part of each of the parties to a transaction, or on the part of one of them, but in neither case resulting from any misrepresentation. Every misrepresentation does, no doubt, induce "mistake" in the literal sense of the word: but a "mistake"

(*a*) See § 21, in Ch. II, Sect. 2, Sub-s. (2), *post*, as to the assimilation to, if not identification with, one another of "veritas" and "constantia" in Roman jurisprudence, and of Veracity and Good Faith in modern systems of ethics.

so induced brings the case within the legal definition of "misrepresentation," and not within the quite different and distinct judicial conception of "mistake."

4. *Ex vi termini*, "misrepresentation" has no concern with cases of non-disclosure, *as such*, that is, with cases of the mere violation of a duty, imposed by the policy of the law on parties standing in certain relations to one another, to observe the utmost good faith by (in particular) disclosure of all known material facts (*b*). But, where non-disclosure takes the form of such concealment, omission, or suppression of facts as renders false a representation already made, and which the revelation of these facts is required to make true, it amounts in law to misrepresentation and falls accordingly within the limits of this work (*c*).

5. There are several legal consequences of misrepresentation besides liability to civil proceedings at the suit of the person to whom the misrepresentation was made. Estoppel *in pais* is one (*d*); criminal responsibility, where the misrepresentation is a false pretence, is another (*e*). But, since neither of these constitutes or confers, as such, a cause of action, neither of them comes within the scope of actionable misrepresentation.

SECT. 3. TOPICS INCLUDED.

6. On the other hand, the subject comprehends innocent as well as fraudulent, and implied as well as express, representation (*f*). Further, those causes of action, or grounds of defence, in respect of misrepresentation which are established by statute, are the subject of special treatment

(*b*) The relations referred to are those of insurance, suretyship, trustee and *cestui que trust*, guardian and ward, solicitor and client, medical man and patient, spiritual adviser and penitent, principal and agent, promoter and company, and various others, where *uberrima fides*, or at least *bona fides*, in the matter of disclosure is peremptorily required, as a duty quite independent of the duty not to mislead by suppression or concealment of facts qualifying those which have already been the subject of a representation. All such cases belong to a separate chapter of law (Non-Disclosure). Another species of misrepresentation which lies wholly outside the limits of actionable misrepresentation (in the strict sense of the word), is that kind of misstatement, misinformation, or misreporting, which constitutes a mere breach of duty on the part of an agent or servant to give accurate and complete information, and careful reports, to his principal or employer, and which therefore ranges itself (so far) under the head of negligence. It is to be observed, however, that there are some cases (*e.g.* the "invitation" and "trap" cases), usually dealt with under the head of negligence, which might equally be described as cases of misrepresentation by conduct. See § 145, *post*.

(*c*) In Ch. IV, Sect. 4, Sub-s. (2), from which it will be seen how the tendency to include cases of non-disclosure in the class of implied misrepresentation has grown, and is steadily growing, in modern times.

(*d*) Estoppel is a rule of evidence, not a cause of action. The same facts which establish the estoppel may of course be ground for an action of misrepresentation; but this is only an accident. Estoppel, as such, merely removes a barrier in the way of, or interposes an obstacle to, a cause of action, which would otherwise fail or succeed in the respective cases.

(*e*) Certain statutory offences are referred to in § 397, *post*.

(*f*) As to innocent and fraudulent misrepresentation, see Ch. V, *post*. As to express and implied representation, see Ch. III, *post*.

apart from, and in addition to, those which are established by the common law (*g*).

7. There are certain causes of action, and affirmative defences, founded on misrepresentation and deceit addressed to and practised upon persons other than the party setting up the claim or plea, but resulting in injury, either to that party, or to the public at large. These are not, in the strictest sense, cases of misrepresentation; but have sufficient elements in common with it to justify inclusion in this Commentary, and separate treatment in the proper place (*h*).

SECT. 4. LEADING CONCEPTIONS—ORDER OF TREATMENT.

8. The proposition underlying the whole law of actionable misrepresentation may be stated, broadly and summarily, as follows. Any false representation made by one person to another, with the object and result of inducing him to enter into a contract or transaction with the representor, or otherwise to alter his position to his prejudice, is the subject of civil proceedings at the instance of the latter person, for the purpose of avoiding such contract or transaction, or, where the misrepresentation was fraudulent, is the subject of an action for damages.

9. It will be apparent from the above summary statement that the following are the leading conceptions, and constituent elements, in the jurisprudence of the subject, which it is accordingly essential in the first instance to analyze and discuss in the following (which is conceived to be their logical) order:—

- (i) Representation (*i*):
- (ii) Misrepresentation—Falsity (*k*):
- (iii) Fraudulent and Innocent Misrepresentation (*l*):
- (iv) Inducement and Materiality (*m*):
- (v) Alteration of Position and Damage (*n*):

After which it will be possible and necessary to consider—

- (vi) The Parties to the Misrepresentation (*o*):
- (vii) Relief and Remedies (*p*):
- (viii) Statutory Proceedings (*q*):
- (ix) The kinds of misrepresentation referred to in § 7, *sup.* (*r*).
- (x) Jurisdiction and Procedure (*s*).

(*g*) See Ch. XIII, *post*.

(*i*) See Chs. II and III, *post*.

(*l*) See Ch. V, *post*.

(*m*) See Ch. VII, *post*.

(*p*) In Chs. IX, (When Misrepresentation is Actionable), X. (Action for Damages), XI (Proceedings for Rescission), and XII (Misrepresentation as a Defence), *post*.

(*q*) See Ch. XIII, *post*.

(*s*) See Ch. XV, *post*.

(*h*) See Ch. XIV, *post*.

(*k*) See Ch. IV, *post*.

(*n*) See Ch. VI, *post*.

(*o*) See Ch. VIII., *post*.

(*r*) See Ch. XIV, *post*.

CHAPTER II.

REPRESENTATION.

10. NOTHING can be a misrepresentation which was never, in law, a representation at all. It is essential, therefore, in the first place, to form a clear conception of what it is which the law pronounces to be a representation. Not all statements answer to the legal description. Some clearly contain all the necessary elements: others, as clearly, fall short of the requirements of the law; but there is a third class—an important and increasing one—of statements *ancipitis sensus*, the designation of which is doubtful and difficult, and which, according to the aspect in which it is proper to regard them, may be placed in the one category or the other, such as expressions of intention, opinion, and the like (*a*).

SECT. 1. THE CONSTITUENT ELEMENTS OF REPRESENTATION.

11. The legal definition of a “representation” is contained in Article 1 of the Code. “A representation is a statement made by, or on behalf of, one person (hereinafter called ‘the representor’) to, or with the intention that it shall come to the notice of, another person (hereinafter called ‘the representee’), which relates, by way of affirmation, denial, description, or otherwise, to a matter of fact. ‘Matter of fact’ means either an existing fact or thing, or a past event.” The above points to two distinguishing marks of a “representation”: (i) communication between two (or more) persons, and (ii) relation to a fact, present or past.

Sub-sect. (1). Communication between Two Persons.

12. It takes two to make a representation, just as it takes two to make a contract. That which is still either *in scrinio* or *in gremio* is innocuous. A statement made in the course of a soliloquy which is overheard, or contained in a diary, or private document, which is overlooked, or surreptitiously read, is not made to the person so overhearing, overlooking, or reading, or to any one, and is, therefore, no representation. “Lying at large” will not do. There must be two parties, a “representor” and a “representee” (*b*), who must be distinct from one another, in substance as

(*a*) See Sect. 2, *inf.*

(*b*) The term “representee” is novel; it is, moreover, unscientifically framed, and uncouth, but not more so than the terms (long since in established use),

well as in name and form (c). A man can no more lie to himself, except in the highly metaphorical sense of the philosopher or the theologian, than he can defame himself (d), or assault himself. "To thine own self be true" may result in, "thou canst not then be false to any man"; but it is only this result of which any court can take cognizance. The virtue and vice attending truth and falsity in statement are not "self-regarding" qualities. In law, as in morals, "ἀεὶ ἐν πλείουσιν ἀναγκὴ εἶναι τὸ ἀδικον" (e). Plato's "lie in the soul" has no place in any scheme of jurisprudence. "Except only in words, there is nothing but truth in the world. . . . Truth supposes mankind, for whom, and by whom alone the word is formed, and to whom only it is applicable. If no man, no truth" (f).

Sub-sect. (2). Relation to Matter of Fact.

13. It is commonly said that a statement, in order to constitute a representation, must be one of "existing fact." In so far as this form of expression serves to distinguish and exclude all statements *de futuro*, and to include in the definition, as "statements of existing fact," all such as do not relate in any way to the future, it is intelligible enough; but, except in this rough and broad sense, it is not adequate, or strictly accurate; for, in the first place, a past event is not an existing fact, and yet a statement as to a past event is, without doubt, a representation; and, secondly, a statement wholly denying a fact is not, literally, a "statement of fact," and yet it is certainly a representation. It is now well settled that any statement which purports to affirm, deny, describe, or otherwise relate

"mortgagee," "vendee," "pledgee," "bailee," "obligee," "addressee," "sendee," (used by the court of Queen's Bench in relation to a telegram at p. 714 of *Playford v. United Kingdom Telegraph Co.* (1869), L. R. 4 Q. B. 706), and "promisee"; and the enormous convenience of such a term in avoiding reduplication of language, and involution of sentences, will be appreciated by any one who has had occasion, in a book, essay, judgment, or opinion, to deal in any detail with the principles of misrepresentation. This, and the respectability and antiquity of the family of abbreviated words with which it has associated itself, must be the excuse for its introduction.

(c) See *Re Ambrose Lake Tin and Copper Mining Co.* (1880), 14 C. D. 390, C.A., where, as BRETT, L.J., at pp. 396-397 observes, the people claiming to be deceived were practically the same as those who were alleged to have practised the deceit, and the action was an absurdity and "a farce."

(d) This aspect of defamation is dealt with in the author's *Law of Actionable Defamation*, App. IV., p. 293.

(e) So, in the law of negligence, there is no such thing as "negligence in the air," as BOWEN, L.J., said in one of the cases on this topic. Jehu may be as careless as he pleases of his own safety when he is driving across a lonely moor, and in that sense reckless and negligent; it is only when another person comes upon the scene, and there are thus *πείλορες* in the Aristotelian phrase, that he can become negligent in the legal sense. Cp. the observations of Lord ESHER, M.R., at p. 497 of *Le Lievre v. Gould*, [1893] 1 Q. B. 491: "if a man is driving on Salisbury Plain and no other person is near him, he may drive as fast and as recklessly as he pleases. But if he sees another carriage coming near to him, immediately a duty arises not to drive in such a way as is likely to cause an injury to that other carriage."

(f) Horne Tooke, *Diversions of Purley*, Part II., Ch. V ("Of Abstraction"), in a passage parodied by Thomas Love Peacock in the mouth of Mr. Jenkinson in Ch. VII of *Headlong Hall*.

to any existing fact, circumstance, or thing, or its qualities, attributes, state, or condition, or to any past event, amounts in law to a representation. So far, all is plain. The difficulties arise when the rule is applied to expressions of mental states and other matters which form the subject of the remainder of this Chapter.

SECT. 2. STATEMENTS OF INTENTION, OR OTHERWISE RELATING TO THE FUTURE.

14. Article 2 of the Code is framed as follows: "A statement of the representor's, or of a third person's, intention, readiness, or capacity to do or abstain from doing anything, or of his expectation as to a matter *in futuro*, is a representation of the then existence of such intention, readiness, capacity, or expectation; but any statement as to a matter *in futuro* which was intended or expressed by the parties to constitute, or which can only be construed as constituting, a promise, is not a representation." This proposition involves the consideration of (1) statements of the representor's own intention, (2) statements which can only be regarded as promises on the part of the representor, (3) statements of a third person's intention, and (4) other statements *de futuro*.

Sub-sect. (1). Statement of the Representor's own Intention.

15. In early times it was frequently said that statements by a man of his own intention, or generally as to his own mental state, are not statements of fact, and therefore not representations (g). It has now, however, been recognized that, in this unqualified form, the proposition is quite incorrect. "The state of a man's mind," according to BOWEN, L.J., "is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but, if it can be substantiated, it is as much fact as anything else. A misstatement of the state of a man's mind is a misrepresentation

(g) As, for instance, by Lord ELLENBOROUGH, C.J., at p. 637 of *Vernon v. Keys* (1810), 12 East. 632 (an opinion criticized by Sir Frederick Pollock in his Preface to 11 R. R.); by PARKE, B., at p. 122 of *Hemingway v. Hamilton* (1830), 4 M. & W. 115 ("there is no misrepresentation of an existing fact, but only an intention at the time of the contract to depart from it"—by which dictum it is implied that intention is not fact); and by Lord CRANWORTH, L.C., at pp. 214-216 of *Jorden v. Money* (1854), 5 H. L. C. 185. Even in very recent times, COZENS-HARDY, J., at pp. 334, 335 of *Re Fickus*, [1900] 1 Ch. 331, uses language which at first sight, and divorced from the context, seems to point in the same direction: "a mere representation that the writer intends to do something in the future is not, though the person to whom it is made relies upon it, sufficient to entitle that person to specific performance or damages. There must be a contract in order to entitle the party to obtain any relief." But here the "relief" referred to was relief of the kind sought in the action being tried, which was based entirely on contract, and in which no misrepresentation was suggested; so that COZENS-HARDY, J., clearly meant only that, where a party asserts a contract, he does not prove it by evidence of a mere representation *de futuro*. He never intended to say that the existence of an intention is not a fact, and if the action had been for misrepresentation of the existence of an intention,

of fact" (h). And, in a later case, the same high authority expresses himself to the same effect: "a man may tell a lie about the state of his own mind, just as much as he can tell a lie about the state of the weather, or the state of his own digestion," though "the inquiry," as he again observes, may be "a difficult and complicated one" (i).

16. The above difficulty in proving the falsity of the fact stated does not make the statement any the less one of fact: nor does the difficulty (a much more serious one) of proving inducement, which, as will be seen hereafter, is an essential ingredient in any cause of action, or in any defence, founded on misrepresentation. Nobody doubts the futility of establishing that a statement was a representation, if it is impossible to show that the representation was false: but the representee is in an equally hopeless position if (after having surmounted this obstacle) he cannot prove that he was induced by the representation, in the only sense in which it was or could have been a false representation, to act as he did to his injury. Now the mere fact that the intention was not fulfilled is in itself no proof of its non-existence at the date of the representation (k), though it may perhaps, in certain cases, tend, with other circumstances, to raise such an inference (l); but what the representee is generally found, in the last resort, to complain of, is the non-execution of the intention, which is tantamount to an acknowledgment that what induced him to alter his position was his belief that the intention would ripen into accomplishment, in other words his reliance upon the statement as a promise, and not as a representation. His belief that the representor had a then present intention to act according to his statement would, in

he would doubtless have used very different language, or would have added the necessary supplements or qualifications. Lord ATKINSON, at p. 432 of *Cavalier v. Pope*, [1906] A. C. 428, H. L., uses still more absolute and unqualified language in a passage which, however, was not necessary to the decision, was not adopted by the other learned lords, and was indeed carefully prefaced by the words, "speaking for myself."

(h) *Edgington v. Fitzmaurice* (1885), 29 C. D. 459, C. A., at p. 483.

(i) *Angus v. Clifford*, [1891] 2 Ch. 449, C. A., at p. 470. Cp. WILLS, J., at p. 260 of *R. v. Gordon* (1889), 23 Q. B. D. 354, Div. Ct.

(k) *Hemington v. Hamilton* (*ubi sup.*): *Benham v. United Guarantie and Life Assurance Co.* (1852), 7 Exch. 744 (*per* POLLOCK, C.B., at pp. 752, 753); *Jorden v. Money* (*ubi sup.*); *Bold v. Hutchinson* (1855), 5 De G. M. & G. 558 (*per* Lord CRANWORTH, L.C., at p. 565); and *Beattie v. Lord Ebury* (1872), 7 Ch. App. 777 (*per* MELLISH, L.J., delivering the judgment of the Lords Justices, at p. 804). A subsequent change of purpose, whether the purpose was announced to another or not, does not even argue inconstancy or inconsistency, according to Cicero ("nemo doctus unquam mutationem consilii inconstantiam dixit esse"); much less does it prove insincerity in the announcement of it. "If I merely assert my intention of abstaining from alcohol for a year, and then after a week take some, I am at worst ridiculed as inconsistent; but if I had pledged myself to abstain, I am blamed as untrustworthy" (Sidgwick, *Methods of Ethics*, p. 279); to which might be added the case of a person who, in order to obtain an appointment from one who is a strong believer in abstinence, asserts an intention to abstain: in that case, if it could be proved that, when so asserting, he was making arrangements for a bout or debauch in a week's time, he would have misrepresented the fact of his intention; but the mere circumstance that he took to drinking in a week would not of itself prove the non-existence of the intention, though it might be some evidence of it, and, with other facts, might establish it. See the next note.

(l) *Clydesdale Bank v. J. and G. Paton*, [1896] A. C. 381, H. L., *per* Lord HALSBURY, L.C., at pp. 386-388, and Lord HERSHELL at p. 395.

the ordinary run of cases, have no effect on his mind, unless he also believed that performance would follow; "I do believe you think what now you speak. But what we do determine oft we break," is a not uncommon attitude: whereas any one who entertains the latter belief would have abundant justification for relying upon it, without taking into consideration in the slightest degree the then state of the representor's mind. Still, though not easy to establish, it is by no means impossible, or even very unusual, for a man to be able to assert truthfully that in the particular case he considered himself to be dealing with *justum et tenacem propositi virum*,—one whose word was (as the phrase is) as good as his bond, or even better, as in the case of that not uncommon type of person who will much sooner break a legally enforceable contract than defeat expectations raised by language binding only in honour (*m*),—and that he was accordingly influenced mainly, if not solely, by his trust in the representor's bare assertion of his purpose, which, in a man of such a character, he was justified in believing to mean inevitable fulfilment (*n*). And, as will be seen hereafter, it is not necessary to prove that the misrepresentation complained of was the sole, or even the main, inducement to the course of action which resulted in the damage (*o*).

17. The knowledge that these difficulties will stand in the way of a simple-minded and trustful representee, when at last driven to assert his rights, emboldens the *dolosus* to practise upon his victims

"the glib and oily art
To speak and purpose not."

It is not congenial to such a nature to adopt Cordelia's straightforward alternative—

"What I well intend
I'll do it, before I speak" (*p*).

He deals in, amongst other *generalia*, "honourable intentions." Forms of expression, which he hopes can never be construed into either a representation, or a binding promise (*q*), are his stock in trade. Nevertheless,

(*m*) Such a man is Emerson's "obligable man." The frame of mind and disposition alluded to in the text is illustrated by the story of the tradesman who, on attending one of Sheridan's levées of creditors armed with a bundle of bonds bearing the debtor's seal, was met with an appeal to his honour: "You, sir, as a man of honour," said Sheridan, "will readily understand that all my available cash must be applied to the satisfaction of my debts of honour, before I can discharge a mere legal obligation," whereupon the tradesman, throwing the bonds into the fire, replied: "Now, Mr. Sheridan, your debt to me is a debt of honour," and was promptly paid in full.

(*n*) See the passage from Sidgwick cited in note (*k*), *sup.* And cp. what WILLS, J., says at p. 360 of *R. v. Gordon* (1889), 23 Q. B. D. 354: "Suppose that by an arrangement for the settlement of litigation, a man was to pay a sum of money, and when the time came, he said: 'I shall not pay until I know that A. has the intention of acceding to this arrangement. I do not insist on having his promise. I shall be content if I know what his present intention is. Otherwise I shall not pay . . . I should have thought that the allegation as to A's intention was one of existing fact.'"

(*o*) *Vide post*, Ch. VI, Sect. I, Sub-s. (2).

(*p*) "King Lear," Act I, Scene I.

(*q*) By reason of the provisions of some statute, requiring the contract to be in writing,

a not inconsiderable chain of decisions, in which the law has been somewhat astute to interpret as statements of fact expressions which might admit of being regarded also in the light of promises, must have served to disappoint the more extravagant of these hopes. Thus the following statements have been held or assumed to constitute representations: statements, implied from the act of ordering goods, of a then present intention of paying for them (*r*); statements that the representor was prepared to lend money, or hand over moneys (*s*); statements as to the objects to which subscriptions to an issue of shares or debentures of a company were intended to be applied (*t*); a statement of matrimonial intentions, not amounting to a promise to marry (*u*); a statement of intention to cultivate land for the purpose of developing an invention for extracting oil from radishes (*x*); a statement of an intention to relinquish business in favour of the representor's son (*y*); an expression of intention to make a lane giving access to property sold, and a new street (*z*); a statement as to an intended mode of keeping accounts (*a*); a statement of the use which the representor intended to make of demised premises (*b*); a statement that the representor had power to stop a sale of certain goods under an execution, and would stop it (*c*);

or rendering it unenforceable on other grounds (limitation of actions, infancy, etc.). To escape criminal responsibility for "false pretences," he is only concerned to avoid making a representation; a promise will not affect him: to escape civil liability, he must be careful to use some form of words which will not amount to either the one or the other.

(*r*) *Bristol (Earl of) v. Wilsmere* (1823), 1 B. & C. 514; *Load v. Green* (1846), 15 M. & W. 216, Exch. Ch.; *White v. Garden* (1851), 10 C. B. 919; *Clough v. London and North Western Railway Co.* (1871), L. R. 7 Exch. 26, Exch. Ch.; *Ex parte Whittaker, Re Shackleton* (1875), 10 Ch. App. 446 (*per* MELLISH, L.J., at pp. 449, 450: "I think that Shackleton, when he went for the goods, must be taken to have made an implied representation that he intended to pay for them, and if it were clearly made out that at that time he did not intend to pay for them, I should consider that a case of fraudulent misrepresentation was shown"); and *Re Eastgate, Ex parte Ward*, [1905] 1 K. B. 465 (*per* BIGHAM, J., at pp. 466, 467).

(*s*) *Barwick v. English Joint Stock Bank* (1867), L. R. 2 Exch. 259, Exch. Ch. (*per* Cur. at pp. 264, 265); *Ramshire v. Bolton* (1869), L. R. 8 Eq. 294; *Blake v. Albion Life Assurance Co.* (1878), 4 C. P. D. 94; and *Babcock v. Lawson* (1880), 5 Q. B. D. 284, C. A.

(*t*) *Re Deposit and Life Assurance Co., Ex parte Ayre* (1858), 27 L. J. (CH.) 579; *Edgington v. Fitzmaurice* (1885), 29 C. D. 459, C. A. (*per* COTTON, L.J., at pp. 479, 480, and BOWEN, L.J., at pp. 482, 483); *Aaron's Reefs, Ltd. v. Twiss*, [1896] A. C. 273, H. L. (*per* Lord HALSBURY, L.C., at pp. 283-285, and Lord WATSON at p. 286).

(*u*) *Anon.* (1505), referred to in Com. Dig. "Deceit," as an instance of "falsity," and in Cro. Eliz. 59; a case where a woman gave a man "blanda verba matrimonio aequipollentia," on the strength of which he gave her presents, and rendered her services. The jury found for the man on this issue, meaning presumably that the lady's statement of her intentions was a misrepresentation of an existing fact, and the court gave him judgment thereon, though he had judgment against him on other issues.

(*x*) *Colt v. Woollaston* (1723), 2 P. Wms. 153.

(*y*) *Biddle v. Levy* (1815), 1 Stark. 20.

(*z*) *Beaumont v. Dukes* (1822), Jac. 422; 23 R. R. 110, *per* PLUMER, M.R., at p. 424.

(*a*) *Benham v. United Guarantie and Life Assurance Co.* (1852), 7 Exch. 744.

(*b*) *Feret v. Hill* (1854), 15 C. B. 207, where, however, on other grounds the party setting up the representation failed.

(*c*) *Cooper v. Joel* (1859), 1 De G. F. & J. 240 (Lord CAMPBELL, L.C.).

a statement that the representor was bound not to build on certain land (*d*); a statement that a company intended to commence operations with a certain number of steamships of a certain type (*e*); a statement that a company was minded to take a third of a certain insurance risk (*f*); and a statement that the holder of a policy of life insurance would, on payment of premiums for four years, become entitled to a full policy (*g*). The above illustrations amply justify the view entertained by BOWEN, L.J., as above stated (*h*).

18. The criminal offences of obtaining money, goods, or credit, by "false pretences" or fraud, are established by much the same evidence as that which is required to substantiate an action for fraudulent misrepresentation. In both the one and the other, there is the same necessity of proving something which amounts in law to a representation, and the same distinction between a statement of existing intention, which is a representation, and a promise, which is not. Decisions, therefore, on the expressions of intention which constitute "pretences" are strictly material to the present inquiry (*i*). They proceed on the same lines and principles as the authorities relating to civil liability, as will appear on reference to any of the treatises on criminal law (*k*). Out of a somewhat lengthy series of such cases, four may be selected as specially illustrative of the distinction between statements of present intention, readiness, or capacity, and statements amounting to nothing beyond promises. In these the following statements were the subject of the following respective rulings. A statement by a woman that by means of "the cards" and "the stuff" (drugs) she "would bring" the prosecutrix's "husband back," and again, that "she could do it," was held to be a false pretence of an existing power and capacity, and not a mere promise, or promissory pretence (*l*). Where a money-lender had induced the prosecutors to pay him a sum of money by a statement that he "was prepared to pay them, or one of them, £100," this was held to be a false pretence of a fact; LORD COLERIDGE, C.J.,

(*d*) *Piggott v. Stratton* (1859), 1 De G. F. & J. 53.

(*e*) *Hallows v. Fernie* (1868), 3 Ch. App. 467.

(*f*) *Traill v. Baring* (1864), 4 De G. J. & S. 318.

(*g*) *Kettlewell v. Refuge Assurance Co.*, [1908] 1 K. B. 545, C. A. This decision was affirmed by the House of Lords, *sub nom.*, *Refuge Assurance Co. v. Kettlewell*, [1909] A. C. 243. On this occasion the tribunal of ultimate resort contented itself with discharging the functions of silent registration: "Lord LOREBURN, L.C.," we are told on p. 245, "without giving any reasons, moved that the appeal be dismissed. The EARL of HALSBURY, and Lords ASHBOURNE, MACNAGHTEN, and JAMES of HEREFORD silently concurred." *Curtis v. Bottomley* (1911), "Times," 1st Aug., C.A., may perhaps be regarded as an illustration of this species of representation.

(*h*) See § 15, *sup.*, and *cp.* MATHEW, L.J., at p. 767 of *Cavalier v. Pope*, [1905] 2 K. B. 757, C. A.: "I see no reason for saying that a misrepresentation, though prospective, may not be equally deceptive. Sect. 4 of the Moneylenders Act, 1900, refers in terms to "deceptive promises."

(*i*) See *R. v. Hazleton* (1874), L. R. 2 C. C. R. 134; *R. v. Cooper* (1877), 2 Q. B. D. 510, and the authorities cited in those two cases; also the four cases cited in notes (*l*), (*m*), (*n*), and (*o*), *inf.*

(*k*) And see Lord Halsbury's *Laws of England*, title "Criminal Law and Procedure," vol. ix., pp. 689, *et seq.*, and Ch. XIII, Sect. 3, *post*.

(*l*) *R. v. Giles* (1865), 34 L. J. (M. C.) 50.

considering the words equivalent to "here is the money ready for you," and the rest of the court concurring, though WILLS, J., entertained some little doubt, discriminating between a statement with reference to a third person's intention—"I am in a position to let you know A. B. is minded to pay you this money"—which there could be no possible difficulty in deciding to be a statement of fact, and a similar statement as to the representor's own intention, in which case he thought that much greater care should be exercised before coming to the conclusion that anything more than a promise had been meant (*m*). By the act of ordering a meal at a restaurant, it was held that the prisoner did not impliedly represent that he had a then present intention of paying for it; but, the jury having found that this intention had not in fact existed, it was held by the court that the prisoner had "obtained credit by means of fraud," within the meaning of sect. 13 of the Debtors Act, 1869, though he was not guilty of a false pretence. But how there could have been any "fraud," unless there had been a "false pretence," or unless he had not merely made a promise and broken it, but had stated a fact and lied about it, it is extremely difficult to discover (*n*). A statement that a certain projected work was to be published by a certain date was held capable of being construed as a statement and pretence of a fact, viz. a present intention and power in the representor of carrying out what he said, particularly when taken in conjunction with another statement of the accused, that "everything was in order" (*o*).

Sub-sect. (2). Statements which are Promises only.

19. Contrasted with, and distinguishable (though often with difficulty) from, the above class, is the type of statement which is shown (by evidence or argument) to have been intended by the representor, and accepted by the representee, as a promise, if anything, and as a promise *only*, or which, whatever the parties meant and intended at the time, can only be construed as such, on any fair principle of interpretation. In all such cases, the words amount either to a promise, or to nothing at all which entails any legal liability. If a promise is made out, then, as in any other case of contract, the only questions are whether the promise has been performed or broken, and, in the latter event, whether there is any obstacle by statute or at common law to its enforcement. To such an issue the question of the promisor's intention, or statement of intention, at the time of making the promise, is just as irrelevant as (conversely) the question of fulfilment or non-fulfilment of a declared intention is to an issue of misrepresentation of such intention.

20. There is a clear psychological distinction between a statement of a present intention to act in a certain manner, and an undertaking or

(*m*) *R. v. Gordon* (1889), 23 Q. B. D. 354.

(*n*) *R. v. Jones*, [1898] 1 Q. B. 119.

(*o*) *R. v. Bancroft* (1909), 26 T. L. R. 10.

engagement so to act. A representation means, as the etymology of the word imports, a presentment over again,—a reproduction, repetition, or reflection, in words or equivalent signs, of a fact or thing which has already occurred, or already exists, *in rerum naturâ*. A promise, on the other hand, obviously does not represent anything. It is not a portrait, or transcript, of any fact or thing. A promise, or proposal, or offer, puts forward (“promittere, proponere, proferre, offerre”) something *sur le tapis*, or *in medium*, which was not there before, for consideration or acceptance. It deals with a *faciendum*, not a *factum*. In either case, there must be a correspondence between word and action, if the representation is to be true, or the promise is to be kept. But the duty of the representor is “to suit the word to the action”; of the promisor, to “suit the action to the word.”

21. In the province of ethics, indeed, and in the earlier stages of our own and other systems of jurisprudence, where ethical and legal principles were scarcely distinguishable, the responsibility attaching to a false declaration of intention is considered much the same as that attaching to a breach of a promise. In the view of moralists, and primitive jurisprudence, veracity and good faith occupy practically the same ground, or, at least, “thin partitions do their realms define.” Truth and Justice are treated as conterminous, in such phrases as the “true and just in all my dealings” of the Church Catechism, in Cicero’s definition of “justitia,” “fides,” and “veritas” (*p*), and in several passages of the Digest (*q*). A modern writer on ethics experiences a difficulty in distinguishing between the characteristic qualities of the two duties: “we fulfil,” he says, “the obligations of Veracity and Good Faith alike by effecting a correspondence between words and facts—in the one case by making fact correspond with statement, and in the other by making statement correspond with fact” (*r*).

22. In law, however, though (as has been said) the judges and jurists of early days made little distinction between a representation and a promissory engagement, and treated every breach of contract as a form of deceit (*s*), it has been recognized since the time of Lord MANSFIELD that there is a broad line of demarcation between the two causes of action, both in theory and as regards their practical consequences, and that, so far from their having some elements in common, they are absolutely exclusive of one another. The theoretical distinction has been insisted on (to take two out of a number of illustrations) by the Exchequer Chamber in a celebrated case, where a representation was defined as “a statement . . . made by one party to the other before or at the time of making the contract of some matter or circumstance relating to it, and which *is not*

(*p*) “Fundamentum justitiæ est fides, id est dictorum conventorumque constantia et veritas,” De Off. I. 9.

(*q*) *Vide post*, App. C, Sect. 2, Sub-s. (1).

(*r*) Sidgwick’s *Methods of Ethics*, p. 279.

(*s*) See App. A, Sect. 1, Sub-s. (2), *post*.

an integral part of the contract" (t), and afterwards by MELLISH, L.J., who pointed out that "it is always necessary to distinguish, when an alleged ground of false representation is set up, between a representation of an existing fact, and a promise to do something in the future" (u).

23. The important difference between the practical consequences in law of misrepresentation, and of breach of contract or warranty, respectively, which flow from the above distinction in principle, would seem to be obvious, but for the fact that the courts have found it necessary from time to time, since at least the year 1778, to insist and enlarge upon this theme, and to point out that neither falsity, nor fraud, nor inducement, nor materiality, all of which are vital elements in any proceedings founded on misrepresentation, has the slightest relevance to any issue in an action for breach of warranty or contract (x). He who promises or warrants, undertakes for exact and literal performance of that which he promises or warrants: but he who makes a statement, inducing another to contract or otherwise alter his position, undertakes only for the absence of any untruth which misleads, that is, for the absence of any *substantial* untruth of sufficient materiality to be capable of inducing, and which does in fact induce. All these matters are made of absolutely no importance by the parties themselves in the case of a contract or warranty, the very object of which is to make it impossible for either of them to raise any such question thereafter (y). Consequently not only is it the law, as will be seen immediately, that he who sues on a promise, as if it were a representation, must fail; but it is equally true that he who sues on a representation, as if it were a promise, cannot succeed either (z).

24. In determining whether the words used in the particular case amount to a representation or a promise, the law regards the substance rather than the form, with the view of accomplishing the primary object of all rules of construction, viz. to give effect to the intention of the parties, or rather the intention which each legitimately supposed the other to have (a). It happens, as has already been shown, that language which reads at first sight as a promise, or contains promisory expressions, may be shown to have been intended as a statement of the fact of an existing purpose.

(t) *Behn v. Burness* (1863), 3 B. & S. 751, Exch. Ch., at p. 753.

(u) *Ex parte Burrell, Re Robinson* (1876), 1 C. D. 537, C. A., at p. 552.

(x) See *Pawson v. Watson* (1778), Cowp. 785, per Lord MANSFIELD, C.J., at pp. 788-790.

(y) See *Thomson v. Weems* (1884), 9 App. Cas. 671, H. L., per Lord BLACKBURN at pp. 683, 684, and Lord WATSON at p. 689, as applied to life insurance, and s. 33 (3), as contrasted with s. 20 (4), of the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), as regards marine insurance. And cp. Ch. VI, Sect. 2, *post*, on the question of materiality generally.

(z) On this latter ground the plaintiff was non-suited by Lord ELLENBOROUGH, C.J., in *Thompson v. Bond* (1807), 1 Camp. 4, and *Read v. Hutchinson* (1813), 3 Campb. 352.

(a) This principle runs through all departments of the law. Cp. the cases where what is described as a condition is held to be a warranty, and what is expressed to be a warranty is treated as a condition; also the cases where "liquidated damages" (so described) are deemed "penalties," and "penalties" (so described) are deemed "liquidated damages."

Thus even a recital appearing on the face of a contract may be construed as a representation, and not as a part or term of the contract (*b*). Conversely, it is quite possible to make the truth of an existing fact the subject of a contract or warranty, and, where the words bear this construction, they will be so treated; or, though the promisor used words expressive of "intention," it may be apparent from other expressions used by him, and the surrounding circumstances generally, that what was really meant to be conveyed was a promise or offer, and nothing else (*c*). I may choose, or be required, not merely to assert, but to engage, undertake, or (in one sense of the word) wager, that a certain thing is so. The result is: if the thing is not as I wager or undertake it to be, I pay damages, or (if the undertaking is in the nature of a condition) the other party is relieved from the performance of his part of the contract. Though I made a statement *de præsenti*, such statement was no inducement to the other party to contract with me, since it was a part of the contract itself, which I break if the statement be unfounded, however firmly I believed in its truth, and which I perform if it turns out to have been true, however little I may have at the time believed that it was. The fact is that there are very few representations of intention which ingenious casuistry cannot plausibly treat as involving promises; and very few promises in which a representation of existing capacity and readiness to perform the engagement is not equally implicit. This has been well expressed by a philosopher whose discussions of ethical themes are conceived in the spirit of sound jurisprudence. "You may either," writes Paley, "simply declare your present intention, or you may accompany your declaration with an engagement to abide by it. . . . In the first case, the duty is satisfied if you were sincere, that is, if you entertained at the time the intention you expressed, however soon, or for whatever reason, you afterwards change it. In the latter case you have parted with the liberty of changing. All this is plain; but it must be observed that most of these forms of speech which, strictly taken, amount to no more than declarations of present intention, do yet, in the usual way of understanding them, excite the expectation, and therefore carry with them the force of absolute promises. Such as "I intend to leave you this estate," "I propose giving you my vote," "I mean to serve you." In which, although the "intention," the "design," the "purpose," the "meaning" be expressed in words of the present time, yet you cannot afterwards recede from them without a breach of good faith," . . . for "there can

(*b*) *Behn v. Burners* (1863), 3 B. & S. 751, Exch. Ch. at p. 754. Cp. Lord HERSCHELL, at p. 394 of *Clydesdale Bank v. J. & G. Paton*, [1896] A. C. 381: "that which is in form a promise may be in another aspect a representation." There are some proceedings which operate both as a contract and as a declaration of existing intention, *e.g.* marriage, which is in law a contract, and in virtue of the operative words *de præsenti*, "I take you for my wife," "I marry you," is also a declaration which creates a relation and confers legitimacy and status. Cp. the observation of MATHEW, L.J., cited in note (*h*), *sup.*

(*c*) As in *Hammersley v. De Biel* (1845), 12 Cl. & F. 45, which is the subject of more detailed consideration in § 27, *inf.*

be no reason for communicating your intention, but to excite some degree of expectation" (*d*). In a later passage the other aspect of the question is presented: "when any one promises a thing he asserts his belief at least of the possibility of performing it; as no one can accept or understand a promise under any other supposition. Instances of this sort are the following . . ."; and the author then takes the cases, by way of illustration, of a promise of a place which the promisor knows to be engaged; of a father promising to settle on his daughter, in contemplation of her marriage, an estate which he knows to be entailed upon the heir male; of a merchant promising a share in a ship which he is secretly advised is lost; and of an incumbent promising to resign a living, when he is privately assured that the bishop will not accept his resignation (*e*).

25. Where the language used is capable of either of the above constructions, one of them must be adopted to the exclusion of the other. If it were the case that the same legal consequences flow from the facts, in whichever light they be regarded, there would be no necessity to make this choice; but (as has been pointed out) this is not the case. When the words are in writing, or, if oral, are admitted, the question of which construction is to be adopted is ordinarily for the court (*f*): in other cases, it may be, or become, a question of fact. The tendency of the courts is, and always has been, to so interpret the meaning of the expressions used, where the facts admit of it, *ut res* (or *spes*, perhaps) *magis valeat quam pereat*. With this view, two opposite leanings have been developed. On the one hand, there has been a tendency, in the so-called "making good" cases, which will form the subject of discussion hereafter (*g*), to construe a promise as a representation, because otherwise the promise, being obnoxious to the provisions of some statute, or without consideration, would fail altogether, and the legitimate expectations of the party complaining would be defeated: on the other hand, in the "misrepresentation of authority" class of case, also considered in a later part of this Commentary (*h*), the inclination has been to treat implied representations of existing authority as implied undertakings that the representation is true, because otherwise in many cases the representor would escape altogether by reason of the inability of the representee to prove fraud.

26. There is no objection to a party resting his case on both constructions, as long as he recognizes that they are strictly alternative to, and exclusive of, one another, and that different facts are required to support them. In the "time-table" case, the plaintiff asserted, (1) that the railway company had promised him that a certain train would

(*d*) *Principles of Moral and Political Philosophy*, vol. i, ch. v. As to the high value of Paley as an authority on the principles of jurisprudence, for which purpose he is frequently cited in the text, see App. B, Sect. 2, § 487, *post*.

(*e*) *Ibid*.

(*f*) *Behn v. Burness* (*ubi sup.*), at p. 754.

(*g*) See Ch. IX, Sect. 3, Sub-s. (1), *post*.

(*h*) See Ch. IX, Sect. 3, Sub-s. (2), *post*.

be at a certain station at a certain hour, and (2) that if they did not so promise, they at all events represented that such a train was then running, as a fact, though they knew the contrary, and that he relied on such representation, which was false and fraudulent, to his damage (i). But what the plaintiff cannot do is to halt between two opinions, and set up a case compounded of ingredients in both causes of action, not being able to establish either by the proper evidence. There is a curious case in which this desperate device was resorted to, and met with the fate which might be expected (k). There the allegation (raised in the form of an affirmative plea) was that the plaintiff had made a contract with the defendant which, at the time of making it, he fraudulently intended to break. This was neither a good plea of breach of contract, because the defendant never alleged that in fact the plaintiff had broken it, nor a good plea of fraudulent misrepresentation, because there was no averment that the plaintiff had expressed any intention to perform it, still less that the defendant had been induced by such declaration of intention to enter into the contract. Even assuming that this "double plea," as Parke, B., calls it (l), could be split up and amended into two good alternative pleas, there were, in the view of the court, no sufficient facts to substantiate either of them. The plea of a broken contract, even if it could have been proved, which it was not, was in no way assisted by the ludicrously irrelevant allegation of a wicked intention to commit the breach. "Suppose," asked ABINGER, C.B., in the course of the argument, "a man contracts to sell goods . . . and afterwards delivers them, could the buyer plead that at the time of the contract the seller fraudulently intended not to deliver them, but to dispose of them otherwise?" (m). Similarly, and conversely, the "imperfections" in the proof of a properly pleaded plea of fraudulent misrepresentation could not be "pieced out," or propped up, by any allegation that the contract had in fact been broken; for, if there had been such misrepresentation, the averment was unnecessary and otiose; if the fact was that there had been none, the allegation could not possibly alter this fact, or tend to alter it.

27. Where the language used, and the other circumstances of the case, clearly indicate a promise, and not a statement of present intention (except in the general ethical sense in which, as pointed out by Paley in the passage already cited, every promise involves such a statement), the courts have not shrunk from their duty to regard the matter in this light only, though the result has been in many cases to leave just expectations unrealized, and absolve from all consequences conduct which was at least morally censurable. In a series of cases, dating from 1845, some of them decided by the House

(i) *Denton v. Great Northern Railway Co.* (1856), 5 E. & B. 860, *per* Lord CAMPBELL, C.J., at p. 867.

(k) *Hemingway v. Hamilton* (1838), 4 M. & W. 115.

(l) *Ibid.* at p. 121.

(m) *Ibid.* at p. 122. The same kind of "double" contention was raised in the House of Lords (though not in any of the courts below) in *Cavalier v. Pope*, [1906] A. C. 428, H. L., and was equally unsuccessful.

of Lords, and most of the remainder by the Court of Appeal, the above rule has been rigidly applied. In several of them, the plaintiff succeeded as on a promise made for good consideration and otherwise enforceable; in others he failed, either because there was no consideration for the promise, or because a statute stood in the way of its enforceability, or because it was too vague to be the subject of specific performance, or was not sufficiently proved. But, in all of them, it was held that there had been no representation: it was a case of promise, or nothing. For the complete elaboration of the doctrine, the four leading decisions of the House of Lords must be consulted. The first of these cases, *Hammersley v. De Biel* (n), is from time to time, but quite incorrectly, cited as an authority for the proposition that at all events for the purposes of the theory of "making good" (o), a promise, unenforceable as such, may be treated as a representation, against contradicting which there is an equitable estoppel. But, putting aside certain dubious dicta of Lord COTTENHAM, L.C., in the court immediately appealed from, which have not been since followed in any authoritative pronouncement, the actual judgment of the House of Lords was that there had been a valid promise for good consideration which could be, and therefore must be, enforced. In this case, two brothers of a lady, with the authority of their father, one J. P. Thompson, wrote to Baron de Biel, the plaintiff and respondent, that "Mr. J. P. Thompson . . . intends to leave a further sum of £10,000 in his will to be secured on her and her children. These are the bases of the *arrangement*, subject of course to revision, but by will be sufficient for Baron de Biel to *act upon*." In another document the above statements were referred to as "proposals." Thereupon Baron de Biel, who was contemplating marriage with the lady, and who had been requested to provide a jointure for her, did so, and married her. The father died without having made any settlement or bequest of the £10,000. Baron de Biel accordingly sued the appellant, as representing the estate of the father, to have the £10,000 satisfied out of such estate, and succeeded before Lord LANGDALE, M.R., who held that the above letters, and other documents in the case, amounted to proposals which, by acceptance, "have ripened into an agreement." His judgment was supported by Lord COTTENHAM, L.C., who again was affirmed by Lord LYNTHURST, L.C., and Lords BROUGHAM and CAMPBELL, in the House of Lords, on the ground of *contract*. It is true that in one passage of his judgment, Lord LYNTHURST speaks of there being no proof of a contract, but a later passage shows that he meant by this expression to indicate no more than absence of proof of a formal instrument of contract. In *Maunsell v. Hedges* (p), it was again held that the language used was either a promise, or nothing; but here Lord CRANWORTH, L.C., and Lord ST. LEONARDS thought that no binding promise had been established by proof of a mere expression of "confidence" on the part of the lady's guardian that he would never alter his will to the intended husband's

(n) (1845), 12 Cl. & F. 45.

(o) See Ch. IX, Sect. 3, Sub-s. (2), *post*.

(p) (1854), 4 H. L. C. 1039.

disadvantage, though followed by the statement "my Tipperary estates will come to you at my death," particularly when regard was had to the fact that the guardian had expressly refused to settle these estates on the lady, and it was therefore held that the husband (the appellant) was not entitled to relief of any kind. In *Jorden v. Money* (q), the defendant and appellant, Mrs. Jorden (who at all material dates was Miss Marnell) had used expressions in correspondence and conversation with the plaintiff (respondent) indicative of a purpose to cancel a certain bond given and debt owing to her by him. The respondent sued the appellant lady and her husband, whom she had in the mean time married, for an order to cancel the bond, declare the debt abandoned, and execute a release, etc., on the footing of misrepresentation of intention. He could not sue as on a promise, because the Statute of Frauds stood in his way, and, further, it appeared that the lady had always expressly refused to make any promise, when urged to do so, saying, "No, you must trust me." Lord ROMILLY, M.R., made the decree, as prayed. On appeal, the Lords Justices differed, Lord CRANWORTH, L.J., being for reversing it, whilst KNIGHT BRUCE, L.J., was for sustaining it. It therefore stood. In the House of Lords, however, Lord CRANWORTH, L.C. (who had by that time been raised to the woolsack, and adhered to his former opinion), and Lord BROUGHAM, *diss.* Lord ST. LEONARDS, reversed the courts below on the ground that, *per* Lord CRANWORTH, L.C. (r), however the words were twisted about, they amounted to a promise, if anything (which promise, however, had been proved by the evidence not to have been made), and did not constitute a declaration of intention, and, *per* Lord BROUGHAM (s), on the additional ground that, even if the statement was a representation, it had not been shown that it was untrue: "she simply stated what was her intention; she did not misrepresent her intention; and I have no manner of doubt that, at the time she made that statement, she had the intention which it is stated she professed." (It may be doubted whether Lord BROUGHAM's reasoning is not to be preferred to Lord CRANWORTH's.) Lord ST. LEONARDS, in his dissentient judgment, does not disagree with the view that the language used amounted to a promise, and not a representation, for he speaks of it as a "binding undertaking" (t), and again as "a promise" (u), but he differs from his colleagues in so far as he holds that such a promise or "declaration of intention" (by which he means promise) should be put on the same footing, for the purpose of an order "to make good," as a representation of fact. Lastly, in *Maddison v. Alderson* (x), where the defendant counter-claimed for a declaration that she was entitled to a life-interest in a certain farm, on the ground that the deceased, whose heir-at-law the plaintiff was, had orally promised to make a will in her favour to that effect, in reliance on which she had rendered him services as housekeeper for many years without wages, it was not pretended that the statements were other than promises, but it was argued that, though

(q) (1854), 5 H. L. C. 185.

(s) At p. 226.

(u) At p. 256.

(r) At pp. 214-216.

(t) At pp. 251, 252.

(x) (1883), 8 App. Cas. 467, H. L.

prima facie unenforceable by reason of the Statute of Frauds, these promises were taken out of the statute by part-performance, and, further, that they could be treated as representations so as to operate by way of estoppel. The House of Lords, however, affirming the Court of Appeal, who had reversed the judgment of STEPHEN, J., in favour of the defendant's counter-claim, held that there had been no enforceable promise, by reason of the statute, which the acts suggested as amounting to part-performance were not sufficient to get rid of, not being referable to the contract, and, further (*per* Lord SELBORNE, L.C.), that "the doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence, and not to promises *de futuro*, which, if binding at all, must be binding as contracts," a proposition which seems to give the quietus to the theory, so persistently urged by equity lawyers in previous cases, that a statement which, for all other purposes is a promise and not a representation, may yet be treated as a representation for purposes of estoppel, or "making good" (y). In the other cases belonging to the class here referred to, the principles enunciated by the House of Lords were followed, or assumed, and applied (z).

(y) Cp. the judgment of Lord SELBORNE, L.C., at p. 360 of *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (1873), L. R. 6 H. L. 352. In *Clydesdale Bank v. J. & G. Paton*. [1896] A. C. 381, H. L., Lord WATSON, at p. 391, expressed the view, or assumed, that a statement that no portion of the proceeds of a certain acceptance would be applied to the extinction of any obligation to the bank, might be just susceptible of being construed as a statement of an existing intention, and, therefore, of a fact.

(z) See *Moorhouse v. Colvin* (1851), 15 Beav. 341 (a statement by the defendant's testator, on proposals for his daughter's marriage, that he would give her £2000 as a portion: held a promise, and enforceable); *Bold v. Hutchinson* (1855), 5 De G. M. & G. 558 (*per* Lord CRANWORTH, L.C., at p. 565: "if . . . a person merely says 'I will leave my daughter £1000,' it will not amount to a misrepresentation if he does not leave her that sum, though it might amount to a contract to do so"); *Home Counties and General Life Insurance Co., Ex parte Woollaston* (1859), 7 W. R. 645, where it was held by KNIGHT-BRUCE and TURNER, LL.JJ., so far agreeing with KINDERSLEY, V.C., that a statement that two medical referees would be appointed to the company, and that W. would be one of them, was not a representation, but a promise: with this decision, however, a later case of *Newlands v. National Employees Accident Association* (1885), 54 L. J. (Q. B.), 428, C. A., should be contrasted, where BRETT, M.R. (see pp. 429, 430), obviously thought that a similar kind of statement, viz. that the plaintiff "would receive the appointment of solicitor to the company," was a representation as well as the subsequent statement that he had been so appointed: *Laver v. Fielder* (1862), 32 Beav. 1 (where the expression,—"I still adhere to my former proposition, viz. to allow Elizabeth £100 a year,"—was a promise, and having been made in a letter by the father of a lady to her intended husband, was enforceable as such); *Coverdale v. Eastwood* (1872), L. R. 15 Eq. 121, where BACON, V.-C., held similar statements, under similar circumstances, to amount to a promise in law, and an enforceable one: this being so, it was quite unnecessary to found himself (as he did at pp. 131, 132), on the "making good" theory on which Lord COTTENHAM, L.C., had with equal irrelevance (for there, too, an enforceable contract had been established) dilated in *Hammersley v. De Biel* (*ubi sup.*); *Dashwood v. Jermyn* (1879), 12 C. D. 776, where a similar type of expression of intention had been used, but not under any circumstances sufficient to show the slightest causal relation between the promise and the alleged alteration of position, and BACON, V.C., accordingly dismissed the action; but the statement was held to be a promise, not a representation; *Synge v. Synge*, [1894] 1 Q. B. 466, C.A., (a case of an antenuptial statement by the defendant to the plaintiff, his intended wife; "you . . . thoroughly understand the terms . . . which

Sub-sect. (3). Statement of a Third Person's Intention.

28. If a statement by a person of his own intention may be a representation, *a fortiori* may a statement by him of a third person's intention, which obviously lends itself more readily to this construction, and less naturally assumes the aspect of a contractual obligation (*a*). If I say something as to my own proposals or purposes, or as to what I am contemplating for the future, it is far more plausible to construe my language in a promissory sense than when I am asserting the intentions of another person, over whose actions I may have, and may be understood by the representee to have, no control whatever. In that event, if I am to be supposed to assume any liability at all as a promisor, it can only be a secondary, not a primary. liability; and neither law nor mercantile usage is prone to fix a man with the responsibilities of a surety, unless his declarations are plain and clear to this effect, and (so far as regards the law) unless they comply with certain ceremonial conditions (*b*).

29. Accordingly a statement as to a third person's intention or purpose has nearly always been held to be a statement of fact, viz. the fact of the present existence of that intention or purpose in the mind of the third person, and therefore a representation (*c*), and not a guarantee, even where

are that I leave house and land to you for my lifetime." The plaintiff acted on this, by marrying the defendant, who afterwards put it out of his power to leave the property by settling it on his daughter, whereupon the plaintiff sued, as for an anticipatory breach. Both MATHEW, J., and the C. A. thought that the statement was not a representation, but a promise or nothing, the difference between the two Courts being that MATHEW, J., thought it was nothing, but the C. A. thought it was an express promise. There again KAY, L.J., delivering the judgment of the Court, went out of his way to encumber a plain case of contract, which needed no such fortification, with the "making good" theory); *Coleman v. North* (1898), 47 W. R. 57 (promise to make a gift); *Re Fickus*, [1900] 1 Ch. 331, where a letter by the deceased to the proposed husband of his daughter, containing (*inter alia*) the phrase, "she will have a share of what I leave after the death of her mother," and urging him to make a settlement, which he did, was held by COZENS-HARDY, J., to amount to a promise, or to nothing, and, in all the circumstances of the case, he thought it was not a promise, and therefore not anything actionable; and *Cavalier v. Pope*, [1906] A. C. 428, H. L., where it was held that out of a contract of a landlord with his tenant to repair a dilapidated house it was impossible to extract a representation of an existing intention to do so, or to make the landlord liable as for misrepresentation, on proof of his never having so intended (though it so happened that in this case such proof was wholly wanting). Cp. the estoppel case of *Chadwick v. Manning*, [1896] A. C. 231, P. C., where it was held that a statement, by conduct and inaction, of an intention to waive a stipulated right to indemnity was, if anything, a promise, as in *Jorden v. Money* (*ubi sup.*), and not a representation.

(a) So WILLS, J., appears to have thought in *R. v. Gordon* (1889), 23 Q. B. D. 354. See his judgment at p. 360.

(b) Required by the Statute of Frauds, sect. 4.

(c) *Hamar v. Alexander* (1806), 2 B. & P. (N. R.) 241, with which compare the other "credit" cases cited in note (*p*) to § 204, *post*; *Barley v. Walford* (1846), 9 Q. B. 197 (a statement that the persons entitled to a certain registered design intended to proceed against the plaintiff for infringement); *Re Hull and London Life Insurance Co., Gibson's Case, Kemp's Case, Hudson's Case* (1858), 2 De G. & J. 275 (a statement that two persons would execute a deed of settlement); and *Hallows v. Fernie* (1868), 3 Ch. App. 467 (where, amongst others, there was a statement in the prospectus that two named persons had consented to become directors, which Lord CHELMSFORD, L.C., agreeing with PAGE-WOOD, V.C., treated as a statement of fact, but one which was

such words as "I durst be bound to pay for him," or "we do not hesitate to guarantee," accompany the assertion (*d*).

Sub-sect. (4). Other Expressions "de futuro." (Expectation, Hope, etc.)

30. When the alleged representor uses merely the general and indefinite language of hope and sanguine anticipation of the future, his expressions are not construed as statements of fact in any sense, or to any extent (*e*); but if he expresses his own, or another's, expectation of the happening of a definite event at a definite future date, or within definable limits, his statement is a representation, in the same way, and to the same extent, as any statement of his own, or another's, intention; that is to say, he is understood in law to assert the fact that the expectation is at the time entertained by himself, or by the third person, but not the fact that the expectation is to be realized (*f*).

not proved to have been false by the mere fact that after allotment these persons retired from the directorate. Some of the expressions in the judgments of Sir James MANSFIELD, C.J., and of Lord ELLENBOROUGH, C.J., in *Vernon v. Keys* (1810), 12 East, 632, Exch. Ch. (see p. 637), and in that of PLUMER, M.R., in *Beaumont v. Dukes* (1822), Jac. 422; 23 R. R. 110 (at p. 424: "the subject of the representation was not a future project contemplated by a third person. If that had been the case . . . it would only be holding out a hope as to the future conduct of a third person not under his control; and it would be the fault of the bidder, if he relied on so loose and vague a report"), which, if literally understood, and taken apart from the subject-matter and context, would seem to imply that the statement of a third person's intention can never be actionable, are clearly at variance with the later authorities, and cannot be relied upon as law.

(*d*) In *Hamar v. Alexander* (*ubi sup.*), the defendant had assured the plaintiff orally that "Christopher Leo is a good man, and may be trusted to any amount, and I durst be bound to pay for him," and the plaintiff relied upon the latter expression as amounting to a guarantee, which of course would have been unenforceable as such by reason of the Statute of Frauds. Lord MANSFIELD, C.J., however, assuming it to be capable of being so construed, held that (the plaintiff not having relied on it at the time as a guarantee) it must be regarded as a mere phrase intended to add force and weight to the previous lie direct (cp. such popular forms of expression as "I will go bail that, etc.," or "I warrant that, etc.," or "I will be bound that, etc."); but Lord MANSFIELD might very well have gone much further, since obviously the words were not capable of being interpreted as a promise to assume a secondary liability, then and there, but only as a statement by the defendant that, if called upon, which he never was, he would not object to bind himself by such an engagement. In *Gerhard v. Bates* (1853), 2 E. & B. 476, where the directors of the company had stated in the prospectus that they "did not hesitate to guarantee a minimum dividend of 33 per cent.," COLERIDGE, J., observed, at p. 482, "surely a man when he says 'I do not hesitate to guarantee' means to say, 'I represent.'"

(*e*) *Beaumont v. Dukes*, *ubi sup.*, per PLUMER, M.R., at p. 424 ("holding out a hope," "loose and vague report"); *Bellairs v. Tucker* (1884), 13 Q. B. D. 562, Div. Ct., where the expressions used in the prospectus as to anticipated profits of the company were held not to be representations, per DENMAN, J., at pp. 572-574; and *Bentley and Co., Ltd. v. Black* (1893), 9 T. L. R. 580, C. A. (per Lord ESHER, M.R.).

(*f*) *Willes v. Glover* (1804), 1 B. & P. (N. R.) 14 (statement of a shipper that he "expects the captain to sail to-morrow," which, said Sir James MANSFIELD, C.J., at p. 16, "imports that he who writes knows the ship to be in such a condition as to give a just expectation of her sailing at that time"); *Re Metropolitan Coal Consumer's Association, Karberg's case*, [1892] 3 Ch. 1, C. A., where LINDLEY, L.J., says, at p. 11, that a statement of expectation is a statement of fact that the party does actually expect as stated; and *A. W. Gamage, Ltd., v. Charlesworth*, [1910] Sc. Ct. of Sess. Cas. 257 (statement of pecuniary "expectations"). On the other hand, in *Barber v. Fletcher* (1779), 1 Dougl. 305, where the statement was—"the ship is expected to leave the coast of Africa in November or December," Lord MANSFIELD, C.J., described it as

31. There are instances of statements as to the future which, even though clearly expressed in the future tense, may import an existing state of things. Thus, a statement, by one who had insured another against being drawn for the militia under the provisions of a certain Act of Parliament, that "all billetings under the Act would cease" on a certain day, was treated as a representation, being presumably considered a statement of fact as to the existing procedure established by a statute then in force (*g*); statements that a certain mine would yield so much, and that a dividend of 33 per cent. was so confidently anticipated that the directors "did not hesitate to guarantee it," were held to be statements of the present state and capacity of the mine, and of the present flourishing condition of the company, respectively (*h*); and, in a third case, *JESSEL, M.R.*, was of opinion that a statement to the effect that certain costs *would be paid* out of a sum described as applicable for that purpose was not a statement as to the future, but as to the present, viz. that these costs *were payable* out of the designated fund (*i*).

SECT. 3. STATEMENTS OF OPINION, BELIEF, OR INFORMATION.

32. When it is pronounced (as it frequently is even now, and *ex cathedrâ*) that statements of opinion are not statements of fact, the proposition, in its absolute and literal sense, is quite incorrect and misleading. "It is often fallaciously assumed," observes *BOWEN, L.J.*, "that the statement of an opinion cannot involve the statement of a fact" (*k*). As in the case of statements of intention, a statement of opinion, belief, information, or other condition of mind, whether of the representor or of a third person, *does* involve at least one statement of fact, viz. that the representor or other person did entertain the alleged opinion or belief, or was possessed of the alleged information, at the date of the representation (*l*). It is *not*, however, a statement of the subject-matter of the opinion, etc., as a fact,—always presuming that the statement only *purports* to be a statement of opinion, belief, or information: for if a man chooses to express in the form of a statement of fact that which he merely believes as opinion, or as information, the statement is for all purposes a representation; and, conversely, if what he states is fact, his statement is not the less a representation because he cloaks it in the language of opinion, belief, or information, or in language susceptible of being so construed by an ingenious metaphysician or philologist. The above rules of law, which are embodied in

"only an expectation," meaning presumably that it was not a representation; but he was probably also referring to the vagueness and generality of the words used, which did not impute the expectation to any person in particular.

(*g*) *Duffel v. Wilson* (1808), 1 Campb. 401.

(*h*) *Gerhard v. Bates* (1853), 2 E. & B. 476.

(*i*) *Mathias v. Yetts* (1882), 46 L. T. 497, C. A., at p. 503.

(*k*) *Smith v. Land and House Property Corporation* (1884), 28 C. D. 7, C. A., at p. 15.

(*l*) See the observations of *BOWEN, L.J.*, which are of quite general application, and refer to any state of a man's mind, at p. 483 of *Edgington v. Fitzmaurice* (1885), 29 C. D. 459, C. A., and at p. 470 of *Angus v. Clifford*, [1891] 2 Ch. 449, C. A. These are cited in notes (*h*) and (*i*) to § 15, *ante*.

Article 3 of the Code, may now be considered separately in relation to the four species of statement to which they apply, viz. : (1) statements of a man's own opinion, etc. ; (2) statements of a third person's opinion, etc. ; (3) statements of opinion, etc., as fact ; and (4) statements of fact as opinion, etc.

Sub-sect. (1). Statement of the Representor's own Opinion, Belief, or Information, as such.

33. The principles enunciated above with reference to statements of a man's own intention (*m*) apply equally, *mutatis mutandis*, to statements of a man's own opinion, belief, or information. In this, as in that, class of statement, the mere subsequent occurrence of events which are in disaccord with, in the sense of failing to realize or justify, the declared intention or opinion or other mental condition or attitude, does not falsify the statement ; but disproof of the existence of the declared condition of mind does falsify the statement, because this was the fact, and the only fact, which it impliedly asserted. Thus an expression of opinion on the part of the directors of a railway company that there was no probability of a rival line being constructed, was treated by the House of Lords as a statement of the fact that they entertained such an opinion, but of no other fact, and the mere circumstance that a rival line was afterwards constructed, did not make the statement a misrepresentation, because there had never been a representation at all as regards the future ; whilst, on the other hand, there was no proof of the falsity of the statement in the only respect in which it was a representation, that is to say, no proof that the directors did not believe what they said they believed (*n*). Similarly, the Privy Council considered a bank's valuation of a security to be a statement of the fact that the bank had *bonâ fide* formed the opinion which they expressed as to its value, and not a statement of the correctness of such valuation : and, the only fact as to which the statement was in law a representation not having been negatived, there was held to have been no misrepresentation (*o*). On the other hand, where a solicitor had both formed an opinion of his own, and had taken another opinion, to the effect that a certain person's interest under a will was absolute, and had concealed both the one and the other from the party to whom he was under a duty of disclosure, thereby leaving him under the impression that his interest was contingent only, he was held liable for such concealment (*p*) ; *a fortiori*, if he had stated as his own, or as the third person's, opinion, that the party's interest under the will was contingent only, he would have been liable for misrepresentation, because he would have falsely stated, not that the interest was contingent, but that he, or the third person, believed it to be. Again, in a later case, which has

(*m*) See §§ 15, 16, *ante*.

(*n*) *New Brunswick Railway and Land Co. v. Conybeare* (1862), 9 H. L. C. 711 (*per* Lord WESTBURY, L.C.).

(*o*) *Melbourne Banking Corporation v. Brougham* (1882), 7 App. Cas. 307, P. C., at pp. 319, 320.

(*p*) *Luddy's Trustee v. Pcard* (1886), 33 C. D. 500.

since been overruled on the question of contractual privity, but not on the question under discussion, CHITTY, J., considered that a document put forward by a valuer as a valuation amounted to a representation of the fact that there had been an actual valuation and exercise of professional judgment and skill,—a representation which was therefore falsified by proof that there had been no real valuation at all (*q*). In reference to contracts of marine insurance, the rule is neatly and succinctly stated in Sect. 20 (5) of the Marine Insurance Act. 1906 (*r*). Similarly, as regards information, a book purporting to be a “journal of bores,” and handed as such to railway contractors, was held to involve a representation that it was a faithful record of information supplied by those who had actually taken the bores (*s*).

34. The obstacles which beset the path of the representee in cases of statements of intention, and which have already been adverted to, are not present to the same extent in the case of statements of opinion. There is no doubt the same difficulty of proving another man's state of mind, to which BOWEN, L.J., more than once alludes (*t*), but the further difficulty of credibly asserting, when it comes to the question of inducement, that the representee relied upon the personality of the representor is not present here to the same extent as it is there (*u*). It is quite natural, particularly where the opinion or belief is as to a matter involving scientific, mercantile, artistic, or professional knowledge, experience, or skill, or where the information is said to be that of a person expert in collecting it, to trust to the name and reputation of the individual; indeed, a layman can trust to nothing else. In most cases of this description, the representee can truthfully affirm that he relied not so much upon the correctness of the opinion, as to which there was no representation, but on the fact that such and such a well-known authority in the branch of knowledge or business in question did actually hold the opinion expressed, as to which there was a representation. *Cuique in suâ arte credendum*. “I was told,” he might fairly say, “that Mr. X., an eminent future lawyer, man of science, literary or art critic, valuer, accountant, financier, stockbroker, or expert in trade, whose name was well-known to me, was of such and such an opinion as to the merits and value of an invention, picture, drama book, business, enterprise, security, or estate. I should not have entered into the contract or transaction which I did enter into, if I had known that this particular individual did not in fact entertain the alleged opinion. To tell me that I am damaged only by the opinion turning out to be wrong, is not to the purpose; because, if I had known that the opinion did not carry with it the authority of the name on which alone, in my ignorance, I did or could rely, I should not have touched the concern at all, or have been drawn

(*q*) *Cann v. Wilson* (1888), 39 C. D. 39.

(*r*) “A representation as to a matter of . . . belief is true, if it be made in good faith.”

(*s*) *Boyd & Forrest v. Glasgow & S. W. Railway Co.*, [1911] Sc. Ct. of Sess. Cas. 33, 73.

(*t*) *Vide ante*, notes (*h*) and (*i*) to § 15.

(*u*) See § 16, *ante*.

into a position in which the incorrectness of the opinion could have had any effect upon my interest." In the case, however, of statements of intention, it is far more unlikely that the representee trusted to the personality of the representor, rather than to the promisory aspect of his statement, in proportion as the individual skill and eminence of the specialist is a rarer quality than common honesty. The above observations of course do not apply to a case where the person professing the opinion is, and is known to be, as much an *ιδιωτής* as the representee. There both parties are on equal terms, and no importance is attached to the fact that either of them has such and such views, or to the views themselves (*x*).

Sub-sect. (2). Statement of a Third Person's Opinion, Belief, or Information, as such.

35. The rules applied to statements as to the representor's own opinion, belief, or information, are equally applicable to statements of a third person's similar condition of mind. Thus, a statement as to the belief of the owners of a vessel with respect to her safety, in a marine insurance case (*y*), or a description of the effect of counsel's opinion (*z*), or a version in a prospectus of a report or valuation of an expert (*a*), are all statements of fact to the extent above indicated, but not further or otherwise.

Sub-sect. (3). Statement of Matters of Opinion, etc., as Fact.

36. If a man, having a genuine opinion on any matter (*b*), chooses, nevertheless, to state it as a fact, or, having information, expresses the subject of it, in Beatrice's phrase, "better than reportingly," he must take all the risks, and abide by all the consequences, attending a representation pure and simple. If, on the other hand, he expresses his opinion, or information, merely as his view, or as hearsay, he makes no representation except to the extent already stated. So where a seller of a cargo of coffee stated to the purchaser that it had been invoiced to him as of first shipping quality, he did not thereby represent that it was of that quality, and Lord ABINGER, C.B., refused to ask the jury the question whether he had or had not so

(*x*) "In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such an opinion is in a sense a statement of fact, about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is": BOWEN, L.J., at p. 15 of *Smith v. Land and House Property Corporation* (1884), 28 C. D. 7, C. A.

(*y*) *Rickards v. Murdock* (1830), 10 B. & C. 527 (a case of non-disclosure of a letter stating the belief in question: but, obviously, a decision that the existence of the belief was a fact which ought to have been disclosed is a decision that any statement concerning it would have been a statement of fact, and therefore a representation).

(*z*) *Luddy's Trustee v. Peard* (1886), 33 C. D. 500; and *Re Roberts, Roberts v. Roberts*, [1905] 1 Ch. 704, C. A.

(*a*) *Re Mount Morgan (West) Gold Mine, Ltd., Ex parte West* (1887), 56 L. T. 622, per KAY, J., at p. 624.

(*b*) The cases where a man states as fact that about which he has no opinion at all are dealt with in Ch. V, Sect. 1, Sub-s. (2), *post*. These are even more obviously pure statements of fact.

represented (c) ; and where a prospectus adopted what had been stated to the directors by the vendor, but professed to give the information only as information, there was held to have been no representation that the information corresponded with the facts, and therefore no misrepresentation merely because it did not (d). On the other hand, where a man states as a positive fact that which is merely the outcome of an imperfect recollection, he makes a representation that the fact is so : and, if it is not so, it is no defence that he had forgotten something (e). So, where the defendant, in a case of representation as to a person's credit, took upon himself to assert, in answer to a question expressly directed to the very point, that what he had previously communicated was the fact, and that he was speaking of his own knowledge, and not from mere hearsay, Lord KENYON, C.J., was of opinion that the statement should be treated as, for all purposes and in every sense, a representation (f). Similarly, where an insurance company, having been misinformed as to the facts relating to the birth and parentage of a certain person, passed on this information to the government when purchasing an annuity, but *as fact*, and not as information (g), and when a professional "water-finder" stated, apparently as a fact, but certainly not in the form of an opinion, that water could be found at a certain depth (h), the same construction was adopted.

Sub-sect. (4). Statement of Matter of Fact as Opinion, etc.

37. The representor is equally responsible, as for a representation to all intents, in the converse case ; that is, where what is really matter of fact is stated either in the form of an opinion, or in a form which is susceptible of being so construed. In the former type of case, the proposition is of course self-evident : a statement that at such and such a time and place something gross and palpable to the senses, and not merely "probal to thinking," happened, is a statement of fact, however much it may be entrenched behind, or prefaced by, expressions of opinion. Examples, however, of the latter kind of case, where the construction is not so obvious, are not wanting. A statement, for instance, as to the credit, character, or reputation of another, relates to a matter of fact, however plausibly it may be suggested afterwards, when responsibility is sought to be affixed to the statement, that the language used must be taken to have pointed to mere belief, judgment, or inference, though not expressly assuming that guise ; or that "whether" the person in question "deserved credit, depended on the

(c) *Moens v. Heyworth* (1842), 10 M. & W. 147.

(d) *Craig v. Phillips* (1876), 3 C. D. 722. Contrast *Re Reese River Silver Mining Co., Smith's case* (1867), 2 Ch. App. 604, *per* Lord CAIRNS, L.J., at p. 625.

(e) *Brownlie v. Campbell* (1880), 5 App. Cas. 925, H. L. at pp. 936, 945, and 953.

(f) *Haycraft v. Creasy* (1801), 2 East, 92, at pp. 102-104.

(g) *A.-G. v. Ray* (1874), 9 Ch. App. 394, *per* JAMES, L.J., at p. 405.

(h) *Pritty v. Child* (1902), 71 L. J. (K. B.) 512, Div. Ct., *per* Lord ALVERSTONE, C.J., at p. 513, and DARLING, J., at p. 514.

opinion of many, for credit consists in the good opinion of many" (i). It is strange that GROSE, J., who is responsible for the above observation, did not realize that though an opinion is an opinion, the existence of that opinion, still more the existence of many "golden opinions," the joint effect of which is to confer "credit," is a fact. In another case (k) the defendant, having stated, as his opinion and valuation, that a life policy was worth so much, though he knew that in fact the person whose life was insured had just died, was not heard to say that the statement was one of opinion, or (to put it as the Court of Appeal did in the case next cited), the expression of opinion here was considered to be of such a character as to involve the assertion of facts, known to him, which justified the opinion. So, where the statement was that a certain person was "a most desirable tenant," it was vainly argued (*inter alia*) in the Court of Appeal that this was a mere expression of opinion (l), BOWEN, L.J., observing that "if the facts are not equally known to both sides, then a statement of opinion by one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion" (m); to which FRY, L.J., adds, in the course of his judgment: "it seems to me that the vendors, by describing him"—the person in question—"as such, stated in substance that they knew no fact which showed him not to be a desirable tenant" (n).

SECT. 4. STATEMENTS OF LAW.

38. The distinction between questions of law and questions of fact so widely permeates, and is so vital an element in, the whole fabric of our jurisprudence, by reason of the separation of the judicial functions assigned to judge and jury respectively, that there is a tendency to draw a sharp contrast between law and fact in reference to every single topic to which those terms can be applied. It must have been owing to this tendency that judges and jurists have so persistently marked off statements of law from statements of fact, in dealing with the principles of misrepresentation, as if they were two separate and self-contained species of statements, standing to one another in a relation of opposition and mutual exclusion. And it is by way of concession to this inveterate habit that statements of law are here dealt with separately. Yet, if the matter be considered closely, it is plain that, for purposes of the doctrine of misrepresentation, a statement of law

(i) *Pasley v. Freeman* (1789), 3 Term. Rep. 51, the famous leading case on representation as to a third person's credit. The dissentient judgment of GROSE, J., which contains the dictum cited, is at pp. 52-56. Cp. the other "credit" cases cited in note (p) to § 204, *post*. Of course where the representation as to credit takes the form of an inference from facts stated or documents referred to, the inference is pure opinion, and the basis of that opinion is pure fact, as in the case of the banker's report in *Parsons v. Barclay and Co.* (1910), 103 L. T. 196, C. A.

(k) *Jones v. Keene* (1841), 2 M. & Rob. 348; 62 R. R. 804.

(l) *Smith v. Land and House Property Corporation* (1884), 28 C. D. 7, C. A.

(m) *Ibid.* at p. 15. Cp. *Willes v. Glover*, cited in note (f) to § 30, as to a case of statement of expectation.

(n) *Ibid.* at p. 17. Cp. *Ferguson v. Wilson* (1904), 6 F. 779, 783 (statement of profits of a business held not to be a mere speculative forecast or estimate).

is only a subspecies of the species just discussed, and that any such statement constitutes a representation in precisely the same sense, to the same extent, and for the same reasons, as any other statement of opinion. That is to say, it is not a statement of the fact of the law being thus, or thus, and is not falsified by the law turning out to be other than as stated : but it is an implied statement by the representor of the fact that the opinion expressed as to the law is actually entertained by him, or by the person to whom it is attributed, and to that extent is a representation. He who expresses his views on law to another is in exactly the same position as one who expresses his views on any other question of science, art, or business, and the inquiry as to whether, and to what extent, his statement is a representation is governed by the same considerations.

39. Further, the same difficulties in the way of the representee's assertion that he relied upon the personality of the individual to whom the opinion is attributed, rather than upon the correctness of his opinion (*o*), are encountered when the opinion is one of law, as when it relates to any other matter, but to a much greater degree, if, as BOWEN, L.J., thought, "where there is a representation made as to a mere matter of law, it is, in nineteen cases out of twenty, made by a person who does not know the law better than the person to whom it is made, and at whose risk it is taken and acted on" (*p*).

40. Nice questions, however, arise very frequently, as to whether the form of expression used makes the statement one of law wholly, or one of fact wholly, or involves several separate statements, some one or more being of pure fact, and the other or others an inference or inferences of pure law. The rules applicable to these several classes of case are stated and distinguished in Article 4 of the Code. Two main types of statement are there indicated : (1) statements of fact, involving and inextricably intermingled with inferences of law, or statements of the existence of a particular document or thing which is alleged to confer a legal right or impose a legal liability ; and (2) statements of abstract propositions of law, or of legal inferences from facts separately stated or within the common knowledge of the parties. The former are statements of fact, and wholly representations ; the latter are statements of law, and not therefore representations, except in so far as they involve statements of the fact that the person alleged to entertain the legal opinion does actually entertain it. Of these in their order.

Sub-sect. (1). Statements of Mixed and Indivisible Law and Fact.

41. This is the common type of so-called "statements of law." And naturally so, because, as pointed out, and illustrated with a variety of common instances, by JESSEL, M.R. (*q*), it is extremely difficult to make

(*o*) See § 34, *ante*.

(*p*) *West London Commercial Bank v. Kitson* (1884), 13 Q. B. D. 360, C. A., at p. 362.

(*q*) At pp. 702, 703 of *Eaglesfield v. Londonderry (Marquis)* (1876), 4 C. D. 693, C. A.

any statement in a matter of business which does not involve some inference or proposition of law. Such statements, however, are not merely by this circumstance rendered statements of law, if law and fact are inseparably interwoven as the compound substructure of the statement, or if the statement is susceptible of being construed either as one of fact, or as one of law, and, owing to the representor's remissness or fraud in hiding his meaning under ambiguous or ambidextrous phraseology, it is impossible to say with certainty which is the proper construction, whereupon every intendment is made *contra proferentem*, and the statement is deemed one of fact. Thus, where an auctioneer on the sale of a public house by auction stated that it was a "free" house, and that there had been a recent decision of Lord ELLENBOROUGH, C.J., that "tying" clauses in leases of such property were invalid,—an admittedly incorrect statement,—the auctioneer might have been regarded either as having said that LORD ELLENBOROUGH had so ruled (which would be fact), or that the inference which he drew from a perusal of his judgment was that he so held (which would be law). The statement was treated as one of fact (*r*). An attorney tells the trustees of a marriage settlement that they can safely advance money to his client, who was, in fact, an infant. This statement could fairly be construed either as a statement of fact that his client was not an infant, or as a statement of law that such trustees would safely advance money to an infant. PLUMER, V.-C., dealt with it as a statement of fact (*s*). Similarly, a statement that the representee took no interest under a certain will, though his heir possibly might do so (*t*), a statement as to the powers of companies under private Acts of Parliament (*u*), and a statement as to a title or interest to or in a particular estate by virtue of certain deeds and circumstances (*x*), have all been regarded as statements of fact. Again, statements by insurance companies as to the validity of their policies in certain events, or on compliance with certain conditions, though they might very well be deemed propositions of general insurance law, can also be, and they accordingly have been (wherever it was possible), construed as statements of the fact of the existing regulations or practice of the company (*y*).

(*r*) *Jones v. Edney* (1812), 3 Campb. 285.

(*s*) *Cory v. Gertcken* (1816), 2 Madd. 40; 17 R. R. 180.

(*t*) *Reynell v. Sprye*: *Sprye v. Reynell* (1852), 1 De G. M. & G. 660.

(*u*) *West London Commercial Bank v. Kilson*, *ubi sup.*, per BRETT, M.R., at p. 362, BOWEN, L.J., at p. 363 (who says that such a statement in no way differs from a statement "that I have a particular bound copy of Johnson's Dictionary"), and FRY, L.J., at p. 363. In *Derry v. Peck* (1889), 14 App. Cas. 337, the H. L. did not differ from the C. A. in so far as the latter treated the statement in the prospectus regarding the statutory powers of the company as a statement of fact.

(*x*) *Cooper v. Phibbs* (1867), L. R. 2 H. L. 149. This was a case of "mistake," but the same principles apply to both classes of case, as regards the question of what is fact, and what law. Moreover, it appears from the judgment of Lord CRANWORTH, L.C., at p. 164, that there was a misrepresentation too, though an innocent one. Lord WESTBURY, at p. 170, says that "a private right of ownership is a matter of fact; it may be the result also of matter of law."

(*y*) *British Workman's and General Assurance Co. v. Cunliffe* (1902), 18 T. L. R. 425, Div. Ct. per Lord ALVERSTONE, C.J., at p. 425, and CHANNELL, J., at p. 426, who

Sub-sect. (2). Statements, in a Separate Form, of Inference of Law from given Facts.

42. In contrast with the above is the class of case where, the facts being separately stated, or being common to both parties, the representor offers an opinion as to the legal incidents of those facts, or the proper legal inference to be drawn from them. In such cases, the matter asserted is only matter of opinion on law, and is not otherwise a representation than as stating impliedly the fact that the person to whom the opinion is attributed actually holds it. It is generally a very nice question to which class the particular statement belongs: but the line has to be drawn in accordance with the above principles, as laid down by Lord WESTBURY (z) and afterwards by JESSEL, M.R. (a). Accordingly, the following have been held to be statements of law, and, as such, not statements of the correctness of the legal proposition put forward, or such as to render the representor answerable for it, if it turns out otherwise;—a statement by the secretary of a company, all the relevant facts and documents being known to both parties, that the company had, or would shortly have, in virtue of those facts and documents, power to issue debentures (b); a statement by a company, assuming it to have been made (which was not proved), that it had power to overdraw, the facts and documents again being common to both parties (c); and a statement on behalf of an insurance company that a policy on the life of the representee's mother, who had no insurable interest, would be a valid insurance (d).

43. It was recognized, however, in several of the cases already referred to, that if the law is *fraudulently* misstated, the representor will be liable for misrepresentation (e); which is only another way of saying that a statement of law implies a representation of fact that the person professing to expound it believes it to be as stated.

appear to have so treated the statement; but the C. A., who affirmed the decision (1902), 18 T. L. R. 502, seem to have regarded it rather as a fraudulent representation of the general law. See also *Kettlewell v. Refuge Assurance Co.*, [1908] 1 K. B. 545, C. A., *per* Lord ALVERSTONE, C.J., at p. 550, and Sir GORELL BARNES, P., at p. 551; with which compare and contrast *Harse v. Pearl Life Assurance Co.*, [1904] 1 K. B. 558, C. A., cited in note (d), *inf.*

(z) See note (x), *sup.*

(a) See note (g), *sup.*

(b) *Rashdall v. Ford* (1866), L. R. 2 Eq. 750.

(c) *Beattie v. Ebury (Lord)* (1872), 7 Ch. App. 777.

(d) *Harse v. Pearl Life Assurance Co.*, [1904] 1 K. B. 558, C. A. The statement was clearly one of abstract law (insurance law), unlike the statements in the two cases first cited in note (y) above.

(e) *Rashdall v. Ford*, *ubi sup.*; *West London Commercial Bank v. Kitson* (1884), 13 Q. B. D. 360 (*per* BOWEN, L.J., at pp. 362, 363: "I am not prepared to say, and I doubt whether, if a man wilfully misrepresented the law, he would be allowed in equity to retain any benefit he got by such misrepresentation,"—a proposition worded with needless caution, for it cannot be supposed that if a statement of law is a representation to the extent indicated for one purpose, it is not so for all, or that the application of the rule is confined to equity, or to proceedings for rescission); *Harse v. Pearl Life Assurance Co.*, *ubi sup.*, *per* COLLINS, M.R., at p. 563, and ROMER, L.J., at p. 566; and *British Workman's and General Assurance Co.*, (1902), 18 T. L. R. 502, C. A.

44. The above observations would of course apply, *a fortiori*, to any enunciation of an abstract proposition of pure law without reference to any facts at all. Such a case is hardly conceivable, because a man would hardly ever be in a position to prove that he was induced to alter his position by the bare statement of a juridical principle *in vacuo*. But even where no facts whatsoever are alleged by the representor, the representee might, no doubt, in many cases, be able to show that both he, to the knowledge of the representor, and the representor, had in mind certain facts and proposals with reference to which alone the statement could have any significance. For instance, A., having proposed to purchase goods of B., is afterwards asked by him whether a contract for the sale of goods is required to be in writing, and, if so, under what conditions, and answers (with the intention to set up the statute, if sued), that no contract for such a sale is ever required to be in writing. This would be a statement in relation to facts, though not to any facts stated by the representor, and in such a case the representee would have no difficulty in proving not only, if the representor did not believe his bad law to be good, a misrepresentation of the impliedly stated fact that he did, but also inducement.

SECT. 5. STATEMENTS AS TO DOCUMENTS.

45. In many departments of the law, particularly in those concerned with rules of evidence (*f*), or practice (*g*), it has been found necessary to draw a sharp line of demarcation between documents and facts, or, rather, between facts proved by documents, and facts proved otherwise. For this reason it has been thought advisable to deal with statements relating to documents as if they constituted a special class of statement. But, in truth, this is not the case, if "matter of fact" is correctly defined (see Article 1 of the Code) as "an existing fact or thing, or past event." A document is a thing. Its existence or non-existence is a fact. Its actual contents, in the sense of the words, figures, or other permanent signs, contained in or appearing upon it, constitute fact. Its purport, office, object, or purpose is fact. Still more clearly, its nature, character, class, or description is fact. All these facts may be the subject of statement and misstatement, description and misdescription. The four classes of statement above referred to are enumerated separately in Article 5 of the Code, and all of them are expressed to be representations. It will be seen hereafter that there is a highly important distinction between the mere voidability of false representations of the first three types, and the absolute voidness of those belonging to the last class (*h*); but, for the purpose of

(*f*) *E.g.* the rules as to the construction of a document being for the court, the rule, as to a document "speaking for itself," the rules as to primary and secondary evidence, etc., etc.

(*g*) *E.g.* discovery of documents, as contrasted with discovery of facts (by interrogatories), etc., etc.

(*h*) *Vide post*, Ch. XI, Sect. 2, and Sect. 4, Sub-s. (6), and Ch. XII, Sect. 3.

the topic now under discussion, there is no significance in this distinction. Statements of all four kinds are alike representations, whatever differences may exist in the respective legal consequences of their falsity.

Sub-sect. (1). Statements as to the Existence of a Document.

46. From the earliest times, there has never been any doubt but that the existence of a document, of whatever kind, is a matter of fact. The judges, in answer to one of the questions addressed to them by the House of Lords on the consideration of Fox's Libel Bill, declared that "whether there exists such a letter"—the question related to threatening letters—"is doubtless matter of fact. . . . It is also matter of fact whether an Act of Parliament, public or private, exists. And the same may be said of every other writing, from records of the highest nature down to any scrap of paper whereon words are written" (*i*). Where the document happens to be a statute, it has been argued that any statement relating to it must necessarily be a statement of law, but BOWEN, L.J., effectually disposed of this erroneous view. "Suppose," he says, "I were to say that I have a private Act of Parliament which gives me powers to do so and so. Is not that an assertion that I have such an Act of Parliament? It appears to me to be as much a representation of a matter of fact as if I had said I have a particular bound copy of Dr. Johnson's Dictionary" (*k*).

Sub-sect. (2). Statements as to Actual Contents of a Document.

47. Equally, of course, a statement as to the wording, or the contents (in this sense), of a document, is a statement of fact; and a misdescription, or a misreading, or a mistranslation of such contents to the representee is a misstatement of fact. Thus the following were held to have been misrepresentations, which of course implied that they were deemed representations,—a misreading of a writing of release as a mere acquittance for arrearages of rent (*l*); a misreading of a lease for one year as a lease for twenty-one years (*m*); a statement that a deed of compromise corresponded with the draft settled by counsel (*n*); misdescriptions of the contents of a draft lease (*o*), of the figures on a negotiable instrument (*p*), of the provisions of

(*i*) These Questions, which were intended to elicit the then state of judicial opinion as the proper functions of judge and jury respectively in cases of criminal defamation, were presented on the 27th April, 1792, and Lord ABRINGER, C.B., laid the Answers thereto of the judges on the table of the House on the 11th May, 1792. The Question referred to in the text was the fifth on the list. See Parl. Hist., vol. 29, col. 1366.

(*k*) *West London Commercial Bank v. Kitson* (1884), 13 Q. B. D. 360, C. A. at p. 363.

(*l*) *Thoroughgood v. Cole* (1582), 2 Coke Rep. 9A.

(*m*) *Anon.* (1684), Skin. 159.

(*n*) *Beadles v. Burch* (1839), 10 Sim. 332.

(*o*) *Clapham v. Shilleto* (1844), 7 Beav. 146.

(*p*) *Billage v. Southee* (1852), 9 Hare, 534, reported *sub nom. Billing v. Southee*, 29 L. J. (CH.) 472. The statement, however, was not proved here to have been made.

a will (*g*), of the contents of an Act of Parliament (*r*), and of the conditions of an engineering contract (*s*); and a mistranslation to an Indian native of an English proclamation of sale (*t*).

Sub-sect. (3). Statements as to Effect and Purport of a Document.

48. Statements as to the general effect, import, or object, of a document, or of any provision or clause thereof, stand on the same footing as statements purporting to record or report the actual language used; the only difference being that the one assumes to be a transcript, and the other a summary, or version, or analysis, of the contents of the document. Instances of statements of this character which have been held to be representations, and, on proof of falsity, misrepresentations, are: a description of the effect of a deed of release of claims for personal injuries (*u*); a statement of the purport of contracts for the remuneration of directors (*x*); a summary or version of a government official's report on a mining district (*y*); a statement of the import of a letter offering property for sale (*z*); a version of the effect of certain contracts and orders for patented articles (*a*); a statement as to the tenor of counsel's opinion (*b*); and a description of the purport of a public announcement of a sale by direction of the court (*c*). To these may be added (though they have not formed the subject of any reported discussion) the street crying of news, and the placards and contents bills which purport to summarize the events recorded in the journals, and publishers' announcements or abstracts of forthcoming works, and the like. Statements as to the legal effect of documents have already been dealt with (*d*).

Sub-sect. (4). Statements as to the Character, Nature, Class, or Description of a Document.

49. A statement of the character or nature of an instrument, or of the class to which it belongs, is not only a statement of fact, and, therefore, a representation, but a representation of a kind so vital to any transaction founded on it, that, in the event of its falsity, the transaction is deemed

(*g*) *Reynell v. Sprye, Sprye v. Reynell* (1852), 1 De G. M. & G. 660.

(*r*) *West London Commercial Bank v. Kitson* (1884), 13 Q. B. D. 360, C. A.; *Derry v. Peek* (1889), 14 App. Cas. 337.

(*s*) *Moss and Co. v. Swansea Corporation* (1910), 74 J. P. 351.

(*t*) *Mahomed Kala Mea v. A. V. Harperink* (1908), 25 T. L. R. 180, P. C. The like effect of mistranslation in conveying a false imputation of fact for purpose of defamation is dealt with in the author's *Law of Actionable Defamation*, App. VI, Sect. 7.

(*u*) *Huschfird v. L. B. and S. C. Railway Co.* (1876), 2 Q. B. D. 1.

(*x*) *Arkwright v. Newbold* (1881), 17 C. D. 301, C. A.

(*y*) *Re Mount Morgan (West) Gold Mine, Ltd., Ex parte West* (1887), 56 L. T. 622 (described by KAY, J., at p. 624, as a "travesty of" the official's "report"). (Cp. the observations of JAMES, L.J., at p. 318 of *Arkwright v. Newbold* (*ubi sup.*).

(*z*) *Stewart v. Kennedy, No. 2* (1890), 15 App. Cas. 108, H. L.

(*a*) *Components Tube Co. v. Naylor*, [1900] 2 Ir. R. 1.

(*b*) *Re Roberts, Roberts v. Roberts*, [1905] 1 Ch. 704, C. A.

(*c*) *Mahomed Kala Mea v. A. V. Harperink, ubi sup.*, where a statement of this kind was made, in addition to the mistranslation above referred to.

(*d*) See Sect. 4, Sub-s. (2).

wholly void *ab initio*, and the document the proper subject of a plea of *non est factum*. There are numerous illustrations in the books of this type of representation, to which it will be sufficient in this place to draw attention by a mere reference to the decisions of which they were the subject (e), reserving further notice of them for its proper place hereafter, when the topic of voidability and voidness comes to be discussed (f).

SECT. 6. EXAGGERATION, PUFFING, ETC.

50. *Simplex commendatio non nocet*, or (as otherwise expressed) *non obligat*. Self-praise is no recommendation, and, for that reason, is no representation either, because nobody trusts to it as such. In mere general laudation of a man's own wares, or inventions, or projects, if the party confines himself to puffery and pushing, and does not condescend to particulars, there is no statement of any "issuable" fact (so to speak), and nothing is put forward which can be supposed to mislead or influence any rational being. The vauntings, or sanguine anticipations, of the advertiser, the prospectus-monger, or the inventor, can deceive nobody. Indiscriminate commendation in the law of misrepresentation is as distinguishable from a statement of fact as, in the law of slander, indiscriminate abuse is from the imputation of a crime (g). Exaggeration of this description is not taken by the community *au pied de la lettre*, but only for what it is worth, and what it is. It is within what is called "the showman's privilege" (h). Thus, vague indefinite or loose expressions such as that a leasehold property was "nearly equal to freehold" (i), or that certain land was "uncommonly rich water meadow-land" (k), "warm protestations of" a person's "power and influence," and "coloured expressions" of certain appointments being "in his gift" (l), "exaggeration of the prisoner's prosperity," in a criminal case of false pretences (m), and a description of farms as "fertile and improvable," and such as might be *considerably*

(e) *Thoroughgood v. Cole* (1582), 2 Coke Rep. 9A; *Edwards v. Brown, Harries and Stephens* (1831), 1 Cr. & J. 307; *Kennedy v. Green* (1834), 3 My. & K. 199; *Hoghton v. Hoghton* (1852), 15 Beav. 278; *Curson v. Belworthy* (1852), 3 H. L. C. 742; *Lewellin v. Cobbold* (1853), 1 Sm. & G. 376; *Vorley v. Cooke* (1857), 1 Giff. 230; *Lee v. Angas* (1866), 7 Ch. App. 79n.; *Foster v. Mackinnon* (1869), L. R. 4 C. P. 704; *Hunter v. Walters* (1871), 7 Ch. App. 75; *National Provincial Bank of England v. Jackson* (1886), 33 C. D. 1, C. A.; *King v. Smith*, [1900] 2 Ch. 425; *Bagot v. Chapman*, [1907] 2 Ch. 222; *Howatson v. Webb*, [1908] 1 Ch. 1, C. A.; and *Carlisle and Cumberland Banking Co. v. Bragg*, [1911] 1 K. B. 489, C. A.

(f) *Vide post*, Ch XI, Sect. 1, Sub-s. (4).

(g) This is dealt with in the author's *Code of Actionable Defamation*, Article 12. (b), (c), and note (f) thereto. The same distinction is drawn between mere innocent vaunting and actionable "disparagement of property" in Article 61 (2), and note (c) thereto, of the same work.

(h) A phrase largely used by the defendant in a recent trial (*Irving v. Bodie*, November, 1909, unreported), who, however, grossly and impudently exceeded the widest limits assigned to this elastic expression even by himself.

(i) *Fenton v. Broune* (1807), 14 Ves. 144.

(k) *Scott v. Hanson* (1829), 1 Russ. & M. 128; 27 R. R. 141.

(l) *Neeley v. Lock* (1838), 8 C. & P. 527.

(m) *R. v. Watson* (1857), 4 Jur. (n. s.) 14.

improved at a *moderate* cost (*n*), were all held to be too general and indefinite to amount to representations. With regard to prospectuses in particular, it was recognized in the House of Lords that "some high colouring and even exaggeration is to be expected" in such documents (*o*), though, in the particular case, it was held that the directors had exceeded the limits of legitimate allurements. So, where "the glowing and exaggerated colours" of another prospectus (*p*), and the sanguine expectations expressed in a third (*q*), and the "puffery" of a fourth (*r*), were "unmixed with baser matter," in the shape of false statements of fact, they were held not to be representations. The above principle is summarily expressed in Article 6 of the Code (*s*).

51. Where, however, the exaggeration or puffery, instead of being based on facts separately stated (in which case the two things stand on their own footings), is punctuated by "detail, to lend verisimilitude to an otherwise bald and unconvincing narrative" (*t*), or is quantified by figures, it assumes the aspect, and renders the representor liable to the consequences, of a simple statement of fact, however turgid or flamboyant its literary surroundings and atmosphere may be. A newspaper which professes to have "the largest circulation in the world," though in a literal sense stating a fact, would be considered in law to be using the mere language of harmless exaggeration; but when the announcement takes such a form as "daily circulation *five times* as large as that of any penny London morning journal," there can be no doubt that this would be held to be not mere vaunting, but a definite representation (*u*). If I say that my pills are "worth a guinea a box" (though this again is, in a sense, a statement of fact), no one could possibly understand the expression as referring to anything but my confident opinion of the intrinsic merits of the pills, or a "guinea" as more than a mere laudatory phrase. But if I say that my "bile beans" contain a new ingredient discovered by such and such an explorer in such and such a tropical country (*x*), or that my "carbolic smoke ball" is a prophylactic

(*n*) *Dinmock v. Hallett* (1866), 2 Ch. App. 21.

(*o*) *Central Railway Co. of Venezuela v. Kisch* (1867), L. R. 2 H. L. 99, 113.

(*p*) *Jennings v. Broughton* (1854), 5 De G. M. & C. 128, *per* ROMILLY, M.R., who was affirmed by the LL.JJ.

(*q*) *Cargill v. Bower* (1878), 10 C. D. 502.

(*r*) *McKeown v. Bouchard-Peveril Gear Co.* (1896), 65 L. J. (CH.) 735, C. A., *per* LINDLEY, L.J. and LOPES, L.J., at p. 736.

(*s*) Cp. Roman law on this topic; see App. C, Sect. 2, Sub-s. (1).

(*t*) The sprightly expression of Pooh Bah in the late Sir W. S. Gilbert's "Mikado."

(*u*) And it was so intended by the proprietors of the journal referred to (the *Daily Mail*), who deliberately, and very straightforwardly, put their statement in a form in which, unlike the similar announcements of other journals, it would, if false, render them liable to proceedings, either for misrepresentation at the suit of any person induced thereby to contract with them for advertisements, or for "disparagement of property" at the suit of any rival newspaper.

(*x*) *Bile Bean Manufacturing Co. v. Davidson* (1906), 8 F. 1181, where it was held that, in actions for misrepresentation, though "mere puffing will not do," and "exaggeration, however gross, of the merits and virtues of a remedy will not do" (Lord SHORMONT-DARLING at p. 1200), and phrases such as "incomparable," "unique," "worth a guinea a box," come to nothing, yet it is a totally different matter where there is proof, as there was in that case, of "statements of alleged facts, carefully

against catching a cold, if used so many times (*y*), I am stating facts, and cannot escape liability, if the facts are false, by urging that they were embedded in a mass of encomiastic generalities. If a statement is made of a fact such as that A. B. is dead, it may be open to the subject of the statement to protest, in the modest spirit of Mark Twain on a memorable occasion, "that the report is much exaggerated," but it certainly does not lie in the mouth of the maker of the statement to say so. An auctioneer is entitled to say, with Thackeray's Mr. Robins, that a desirable residential estate is buried under rose leaves, or drowned in the songs of nightingales (*z*), but if he deserts the pathless realm of generalities for the high road and *terra firma* of fact, it is no longer a case of the "loose opinion" or "puffery" of an "auctioneer or vendor" (*a*). The same judge who decided that "rich watered meadow-land" was not a representation, as regards the mere assertion of richness, held nevertheless that it was a statement of the fact that the land was water meadow-land (*b*). And in the same case in which it was held that the description of farms as "fertile" and "improveable at a moderate cost" was not a statement of fact, it was held that a description of their occupation and tenancy was (*c*).

elaborated, and intended to be accepted as facts" (*per* the Lord Justice Clerk, at p. 1197).

(*y*) *Cartill v. Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256, C. A. This was a case of contract, but the observations of LINDLEY, L.J., at p. 261, and A. L. SMITH, L.J., at p. 273, to the effect that the advertisement was not a mere puff, but an offer, which, on acceptance, would become a contract, are distinctly germane to the present question, because it is obvious that, if a statement that a man will give £100 to any one who catches a cold after having used the remedy so many times, is not a mere puff, a statement that the remedy has the preventive effect invariably, or almost invariably, would still less be so. If the one is an offer, the other is certainly a representation.

(*z*) These "absurd puffs" are nothing but "flourishes which in practice mislead nobody; which no purchaser ever acts upon". *Magennis v. Fallon* (1829), 2 Moll. 561, 587.

(*a*) *Beaumont v. Ducks* (1822), Jac. 422; 23 R. R. 110 (*per* PLUMER, M.R., at p. 426); and *Scott v. Hanson* (1826), 1 Sim. 13, *per* LEACH, V.-C., at p. 15, whose opinion was, on this point, affirmed by Lord ELDON, L.C. (1 Russ. & M. 128).

(*b*) *Scott v. Hanson* (*ubi sup.*), where Lord ELDON, L.C. (1 Russ. & M. 131), reversed LEACH, V.-C., as to two out of the fourteen acres in dispute, on the ground stated in the text, affirming him as to the other twelve acres, as stated in the preceding note.

(*c*) *Dimmock v. Hallett* (1866), 2 Ch. App. 21.

CHAPTER III.

HOW A REPRESENTATION MAY BE MADE.

52. THE modes and forms of representation are infinite. Any physical symbol which reproduces or assumes to reproduce a fact, presents or assumes to present it over again, and is, therefore, literally, as it is substantially, a representation. These symbols, as stated in Articles 7 and 8 of the Code, may be either express or implied. When express, they consist either of writing or analogous permanent signs, or of speech or other transitory signs. When implied, the implication may arise from the conjoint effect of several express statements, or from all that is said coupled with all that is left unsaid; or it may arise from acts and conduct, or (in a limited class of case) even from silence and inaction.

SECT. 1. EXPRESS REPRESENTATIONS.

53. Besides words and figures expressed in writing or print, or by analogous processes, a representation may be made by the use of any other permanent symbols or means, such as plans and drawings (*a*), maps (*b*), pictures and photographs (*c*), or any like scientific or artistic transcript of thought (*d*).

(*a*) In *Beaumont v. Dukes* (1822), Jac. 422; 23 R. R. 110, a plan was used to add force to a verbal representation. In *Denny v. Hancock* (1870), 6 Ch. App. 1, a plan played a very important part. It was a question whether certain trees and shrubs had been represented as passing on the sale of land. The vendor relied on this plan as correcting the falsity of his representation in words, and as negating deceit. It was held, on the contrary, to have been part of it (*per* JAMES, L.J., at pp. 11, 12, and MELLISH, L.J., at pp. 13, 14). *Re Arnold* (1880), 14 C. D. 270, C. A., was a case in which it was held by BAGGALLAY, L.J., at p. 282, and BRAMWELL, L.J., at p. 284, that it was impossible to exclude the plan from the particulars of sale in determining whether there had been a misrepresentation or not. Lastly, in *S. Pearson and Sons, Ltd. v. Dublin Corporation*, [1907] A. C. 351, H. L., the representation complained of, as to the existence and position of a certain wall, was contained in, *inter alia*, plans and drawings prepared by the defendant's engineer.

(*b*) *Re Mount Morgan (West) Gold Mine, Ltd., Ex parte West* (1887), 56 L. T. 622, where the company in vain relied upon a map accompanying the prospectus as revealing the truth, and so neutralizing the express and implied false statements therein.

(*c*) *Newman and Co. v. Pinto and Sons* (1888), 57 L. T. 31, C. A. (pictures and emblematic designs on the lids of cigar-boxes for the purpose of representing cigars imported from Germany as "Havana cigars"); and *Slingsby v. Bradford Patent Truck and Trolley Co.* (1906), W. N. 51, C. A. (picture of buildings, described as "a photograph, not a sketch," to the negative or printing-block of which the plaintiff's name had been added by hand, though it did not appear on the actual buildings, or in the photograph). In the *Times* of the 15th July, 1910, there is a report of two actions brought in the City of London Court by the proprietors of a newspaper for damages for fraudulent misrepresentation by the delivery of "faked" photographs of certain genuine public events for reproduction and publication in the newspaper.

(*d*) The like potency of pictorial representations, or faked or "composite"

54. Similarly, it is not only the spoken word which conveys a statement of fact. "A nod or a wink, or a shake of the head, or a smile" (*e*) may equally well serve the purpose. The very meaning of innuendo is a nod. Gestures and demeanour are, under some circumstances, as efficacious to convey a deceptive representation, as, in cases of slander, to insinuate a defamatory imputation (*f*). "Let but mysterious expressions be aided by significant looks and tones, and you may cajole a hot and ignorant audience to believe anything by saying nothing" (*g*). In this way looks and gestures may subsidize language; they may also stand altogether in the place of words, or even contradict them, and the representor may by the use of such means convey a statement as clearly as another may convey a menace, and, as Lord REDESDALE said of such a person, "prevail without using a single word of threat, like the beggar in *Gil Blas* who, with his gun at his shoulder, extorted money from the traveller without uttering a word" (*h*). Whenever there is such a discrepancy, it is safe to say that, in nine cases out of ten, the representation is made in a more real sense by manner, glance, and gesture than it is by voice (*i*); but it is sufficient, for present purposes, to note that the one is as much a medium of representation as the other.

SECT. 2. IMPLIED REPRESENTATIONS. (ACTS AND CONDUCT.)

55. The types of representation which are implied from direct and express representations (such as implied statements of an existing intention, opinion, or belief), or from absolute representations coupled with silence as to matters which it was the duty of the representor not to suppress, are discussed elsewhere (*k*). In the present place it is proposed to consider the other class of implied representation—that which is inferred from acts and conduct—a class which, in the growing complexity of modern life, assumes ever increasing proportions and importance.

56. To take the simplest illustrations, "a man may act a lie," says photographs, to defame, as well as to deceive, is well known. This topic is dealt with in the author's *Code of Actionable Defamation*, Article 10, and note (*y*) thereto.

(*e*) *Walters v. Morgan* (1861), 3 De G. F. & J. 718 (*per* Lord CAMPBELL, L.C., at p. 724), a case cited and relied upon by CHITTY, J., at p. 209 of *Turner v. Green*, [1895] 2 Ch. 205.

(*f*) This question is discussed in the author's *Code of Actionable Defamation*, Article 11, and note (*z*) thereto, and in App. V, Sect. 1, and App. VI, Sect. 5.

(*g*) Coleridge, *Lay Sermons* (ed. Derwent Coleridge, 1852), pp. 169, 170.

(*h*) At p. 668 of *Webb v. Rorke* (1806), 2 Sch. & Lefr. 661; 9 R. R. 122. The incident referred to by Lord REDESDALE, then L.C. of Ireland, is to be found in Ch. II of *Gil Blas*.

(*i*) It is only in the realms of fancy (*e.g.* Sir W. S. Gilbert's "Palace of Truth"), that the voice speaks truth and the gestures lie. Ovid's "ne vultu destrue verba tuo," was wise counsel, gravely applied by Bacon to weightier matters than the poet was writing about. "It is good," says the philosopher, in discussing Simulation and Dissimulation (Essay VI.), "that a man's face give his tongue leave to speak. For the discovery of a man's self by the tracts of his countenance . . . is many times more marked and believed than a man's word."

(*k*) See, as to the former class, §§ 16, 33, and 38, *ante*, and, as to the latter, Ch. IV, Sect. 4, Sub-ss. (1), (2) and (3), *post*.

Paley (*l*), "as by pointing his finger in a wrong direction, when a traveller inquires of him the road, or when a tradesman shuts up his windows to induce his creditors to believe he is abroad; for, to all moral purposes, and therefore as to veracity, speech and action are the same." Indeed, conduct in many cases is a more real expression of thought than language, just as circumstantial evidence is often more valuable and cogent than direct evidence. The silent witness is the more convincing—

"for, in such business,
Action is eloquence, and the eyes of the ignorant
More learned than the ears" (*m*).

57. Apart from the above simple cases, where the inference is plain and palpable, there are a variety of others where it is a somewhat more complicated or subtle process to extract the representation from the acts and conduct. In the succeeding paragraphs of this section a rough classification of these is attempted.

58. In cases of delivery of property under a contract of sale, or otherwise, the following implications of a representation may be made. On the one hand, the purchaser of goods, by the mere act of ordering them, is understood to represent that he then has the intention of paying for them (*n*). On the other hand the person assuming to sell or let or transfer property impliedly represents that it exists (*o*); he who delivers or hands over documents or

(*l*) *Principles of Moral and Political Philosophy*, Book I, Ch. XV (cp. Book I, Ch. V, on "tacit promises" by acts and conduct). In *Barley v. Walford* (1846), 9 Q. B. 197, Lord DENMAN, C.J., at p. 208, speaks of the absurdity of supposing that a man, "having a conspicuous clock too slow," could be liable to any one who went by it. No doubt this would be ridiculous; but the act of pointing to a clock, known to be too slow or too fast, might well be a misrepresentation of the kind mentioned by Paley.

(*m*) "Coriolanus," Act III, Sc. 2. The same view is expressed in the familiar lines:—"Scgnius irritant animos demissa per aures Quam quæ sunt oculis subjecta fidelibus." As to the Roman law on this topic, see App. C, Sect. 2, Sub-s. (2). Slander is similarly conveyed by acts and conduct, or (in the phraseology of Scots law) "actings." See Article 18, Rules 4, 5, and 6, and notes thereto, in the author's *Code of Actionable Defamation*.

(*n*) See the cases cited in note (*r*) to § 17, *ante*.

(*o*) *Colt v. Woollaston* (1723), 2 P. Wms. 153, the quaint and delusive headnote of which is: "bill in equity lies to recover back money paid on a bubble." The defendants were the projectors of the "bubble," which was called the "Land Security and Oil Patent," the object being "to extract oil out of radishes." The project failed, no oil having been made, or radishes grown on the land which was supposed to have been dedicated to that purpose, and which was offered as security to the adventurers. The land turned out to be subject to charges amounting to £85,000, after payment of which, it was worth considerably less than nothing. This was held to be "an imposition," the giving of this security being one of the principal features in it. "It is giving them moonshine, instead of anything real" (p. 156), which statement involves the hypothesis that the mere giving of the security was an implied representation that it was "something real," that is, had *some* value as a security, and was not "moonshine." A similar case (unreported) was referred to in the judgment (at p. 157) of a patent for extracting oil out of beech, the invention of Aaron Hill (well known in his day as a writer on dramatic subjects and a lifelong assailant of Pope (*vide* Sir Leslie STEPHEN, *sub nom.*, in the Dictionary of National Biography), where "a security was agreed to be made of lands which came out to be *terra incognita* within the degrees

grants leases impliedly represents that they are genuine (*p*) ; and the seller of an article presenting a certain appearance to the senses of the purchaser, impliedly represents that the article *est quod videtur*—is in fact what *ex facie* it purports to be—for, when this is not so, and falsehood's "goodly outside" is manufactured by a concealment of defects, there is a misrepresentation ; and this there could not be unless there were an implied representation in the first instance of the kind indicated. Thus selling sea-damaged pimento by samples from bulk, which showed no damage (this being only apparent on unpacking), and sending out the advertisements of the sale too late to enable any purchaser to inspect and so discover the defect, was held to be a misrepresentation of the pimento as sound (*q*) ; on the sale of a patented invention for baking bread without the use of spirit or ferment, the conducting of a demonstration or experiment which appeared to satisfy the description, but in which spirit and a special ferment had been secretly introduced, was treated as one of the means by which an implied misrepresentation of the nature of the invention had been made (*r*) ; and the "false packing" of goods, or the covering up of a defect in a cannon by artifice (*s*), have been treated as acts and conduct amounting to misrepresentation (*t*). So clearly, indeed, is any such device deemed a representation that not even an express term in the contract to take the property with all faults, or at all risks, will countervail it, if false and (as in all such cases must follow) fraudulent (*u*). Conversely, an intending buyer of shares, who conceals and depreciates their value by "fraudulent manœuvres," such as manipulating accounts of dealings in them, is as guilty of implied misrepresentation

of latitude 50 and 57." Cp. *Richardson v. Sylvester* (1873), L. R. 9 Q. B. 34 (advertising a farm to let held a representation that the party has a farm to let), and *Ajello v. Worsley*, [1898] 1 Ch. 274 (advertisement of piano held to involve a representation that party had pianos in stock).

(*p*) *Edinburgh United Breweries and Dunn v. Molleson*, [1894] A. C. 96, H. L. (handing over of books, which Dunn was entitled to have examined by an accountant as a condition of sale of a business, deemed an implied representation that they were genuine, *per* Lord HERSCHELL, L.C., at p. 111); *Marsham v. Weaver* (1899), 80 L. T. 412, where the putting forward as security of fictitious leases (by the party to himself under an alias) was held an implied misrepresentation of their genuineness ; and *Boyd and Forrest v. Glasgow and S. W. Railway Co.*, [1911] Sc. Ct. of Sess. Cas. 33 (where the putting forward of a "journal of bores" was held an implied representation of its genuineness as a record of bores actually taken). So, in *Scholefield v. Templer* (1859), 4 De G. & J. 429, where a debtor and his surety proposed to execute a transfer of a mortgage, Lord CAMPBELL, L.C., held this to be a representation that there *was* such a mortgage.

(*q*) *Jones v. Bowden* (1813), 4 Taunt. 847.

(*r*) *Lovell v. Hicks*, No. 1 (1836), 2 Y. & C. (EXCH.) 46, *per* ALDERSON, B., at pp. 53–55.

(*s*) *Ormerod v. Huth* (1845), 14 M. & W. 651, and *Horsfall v. Thomas* (1862), 1 H. & C. 90. In the first case the defendant escaped because he was not proved to have had anything to do with the "false packing," and, in the second, because the covering up of the defect in the cannon was not proved ; but in neither case was it doubted that acts and conduct of the character in question constitute implied representation.

(*t*) Cp. the devices of "salting" mines, and "faking" furniture, whether for the purpose of making old present the appearance of new, or new that of antique—the latter a particularly flourishing industry at the present time. False weights and measures, etc. (see Ch. XIII, Sect. 3), are also "silent assertors."

(*u*) *Vide post*, Ch. X, Sect. 2, Sub-s. (2).

as the intending seller who, by the like manœuvres, conceals and minimizes faults and defects in the property to be sold (*x*). The mere handing to a customer of an article of a certain substance and quality, without saying a word, is a representation that it is of that substance or quality (*y*). Lastly, the common device of "rigging the market," or (more euphemistically) "making a market," by procuring persons to pretend to buy and sell in the market at fictitious prices, is clearly an implied misrepresentation, and a fraudulent and indictable one (*z*).

59. Another class of representation by conduct comprises cases in which an act or transaction may be lawfully or unlawfully carried out, and where (since the law presumes against illegality) the mere doing of the act or entering into the transaction is equivalent to a representation that all those circumstances and conditions exist but for which the act or transaction would be unlawful. Thus the act of delivering an article of food to a customer, at his request, the delivery of which article in an adulterated state would be a statutory offence, is, of itself, a representation that it is unadulterated (*a*); the mere paying of addresses to a lady with a view to matrimony, may, even in a criminal case, be deemed tantamount to a representation or pretence that the person so acting is unmarried (*b*); the mere act of sending an animal to a repository or market or place for public sale may raise the inference of a representation that, so far as the party knows, the animal is not suffering from any contagious or infectious disease which would make the act unlawful, or a

(*x*) *Walsham v. Stainton* (1863), 1 De G. J. & S. 678 (*per* TURNER, L.J., at pp. 689, 690).

(*y*) See Lord Halsbury's *Laws of England*, title "Food and Drugs," vol. xv, p. 20 (*h*).

(*z*) In *National Exchange Co. of Glasgow v. Drew* (1855), 2 Macq. H. L. 103, the company lent shareholders money to buy further shares with, assuring them that they would not be called upon for any further contribution till the stock could be sold at a profit. The defence to the action (which was to recover the money so advanced) was that the above acts and conduct amounted to an implied misrepresentation of the then flourishing state of the company, and (*per* Lord BROUGHAM in the course of the argument) that a *turpis causa* was shown, viz. an attempt by the company to do that which was equivalent to "rigging the market." This defence prevailed. In *Scott v. Brown, Doering, McNab and Co.*, [1892] 2 Q. B. 724, C. A., the parties were shown to have conspired to create fictitious prices for shares in a company by procuring imaginary bargains to be made and quoted as real on the Stock Exchange. This was misrepresentation by conduct, said the C. A., and, further, an indictable conspiracy, as in *R. v. De Berenger* (cited in Ch. VIII, Sects. 2 and 3, *post*). "I see no distinction," observed LOPES, L.J. (see p. 730), "between rumours (as in this case) and false and fictitious acts." "Test it in this way," added A. L. SMITH, L.J., at p. 734,— "suppose a purchaser induced to purchase shares . . . by means of a fictitious premium created by them" (see the parties to the action) "solely for the purpose of inducing such purchaser to buy, could he, or not, have successfully sued either or both for a false and fraudulent misrepresentation? I say that he could." In this connection a somewhat similar description of case, *Lindsay Petroleum Co. v. Hurd* (1874), L. R. 5 P. C. 221, should be noted. There a scheme was devised whereby communications were to pass between a person posing as absolute owner of property and another person making him sham offers at fictitious prices, and this was held to be an implied fraudulent misrepresentation (see p. 243).

(*a*) *Fitzpatrick v. Kelly* (1873), L. R. 8 Q. B. 337, 341, 342, 343.

(*b*) *R. v. Copland* (1842), Car. & M. 516, *per* Lord DENMAN, C.J.

violation of any statute for the time being in force (c) ; in company transactions, the declaration of a dividend may amount to a statement that the dividend has not been paid out of capital, which would be illegal ; and the issue of fully paid shares is, similarly, an implied representation that cash has been paid for them, in any case where there has been no filed contract (d). On the other hand, the mere act of trading is not a representation that the trader is of full age, because it is not unlawful for an infant to trade (e) ; nor is the mere advertisement of an article, with the description " trade mark " appended, an implied representation that the party has registered the trade mark, for it is not illegal to have and use one which is unregistered (f).

60. Where a person, in entering into a transaction, conducts himself as if he bore a certain character or *persona* he is deemed to represent that he actually fills that character or *persona*. Thus a party, by sending bought and sold notes to the other party, and guaranteeing the performance of the contract, impliedly states that he has a principal (g), and all the cases of implied warranty of authority from assuming to act as if such

(c) *Bodger v. Nicholls* (1873), 28 L. T. 441, where BLACKBURN, J., says, at p. 449 : " I entertain no doubt, but it is not necessary to decide the point, that the defendant by taking the cow to a public market to be sold, though he does not warrant her to be sound, yet thereby furnishes evidence of a representation that, so far as his knowledge goes, the animal is not suffering from any infectious disease. To say otherwise would be to run counter to the common sense of mankind." In *Ward v. Hobbs* (1878), 4 App. Cas. 13, H. L., the House of Lords did not differ from this very strong pronouncement, which was cited and much relied upon in argument. There pigs, suffering from typhoid fever, had been sent to a market, contrary to the provisions of a statute : but the seller who so sent them expressly refused to warrant their soundness, and on that ground escaped. It was not necessary, therefore, to consider whether the seller's act was a " representation by conduct," which Lord CAIRNS, L.C., evidently thought it might be, though he added (at p. 22) : " I desire, so far as I am concerned, to hold myself unpledged, if such a case had to be considered." Therefore the opinion, or (if it be a dictum) the very strong dictum, of BLACKBURN, J., remains unaffected, and it would seem to be quite sound. Of course in any case where there is no statute prohibiting the act in question, no implication of a representation arises. In *Hills v. Balls* (1857), 2 H. & N. 299, there was no clear allegation that the glandered horse had been sent to a public place (which was all that the statute prohibited), and no representation of its soundness was implied from the mere act of selling it at a repository, which, for aught that appeared, might have been a private place.

(d) In *Jackson v. Turquand* (1869), L. R. 4 H. L. 305, the question whether a declaration of a dividend and bonus (which it would be illegal to pay out of capital) amounts to a representation by conduct, was discussed by Lord HATHERLEY, L.C., at pp. 308, 309, and Lord WESTBURY at p. 315, but not decided, because the conclusion of the House that there had at any rate been no dishonesty in any representation which might have been made, rendered it unnecessary to do so ; but in a previous case in the House of Lords, *Burnes v. Fennell* (1849), 2 H. L. C. 497, Lord CAMPBELL, at pp. 524, 525, and Lord BROUGHAM at p. 531, express, in the strongest possible language, confident opinions that such payment is an implied declaration to the world by acts and deeds that " the company has made profits which justify such a dividend." The case as to the issue of fully paid shares (a case of representation for the purpose of estoppel) is *Bloomenthal v. Ford*, [1897] A. C. 156, H. L. (per Lord HALSBURY, L.C., at pp. 163, 164, and Lord HERSHELL at p. 169).

(e) *Re Jones, Ex parte Jones* (1881), 18 C. D. 109, C. A., per JESSEL, M.R., in the argument at p. 115 (" a boy selling oranges in the street does not represent himself to be of full age "), and in his judgment at p. 121 ; and LUSH, L.J., at p. 125.

(f) *Sen Sen Co. v. Britten*, [1899] 1 Ch. 692, per STIRLING, J.

(g) *Wilson v. Short* (1847), 6 Harc. 366.

authority existed may also be, and in some instances have been, put as cases of implied representation (*h*). Nearly all the non-disclosure cases also, though usually considered not to fall within the province of representation, strictly so called, may be, and have been, treated as implied statements that the transaction which the party purports to have entered into is, so far as he knows, of the normal and usual type, and that he has withheld nothing which, if revealed, would show it to be otherwise (*i*).

61. Personation by "make-believe," a device as old as Jacob and Esau, is of course as much a representation as an assumption of an alias by direct statement. The appearance of a man at a shop in the cap and gown of a member of a university is, by itself, a representation that he is such a member (*k*). So the giving of a business card of a firm is a representation that the person so acting is a member of that firm, even if no words are used (*l*). A man who had been agent for another, but had ceased to be so, by continuing to do business with those who had known him as such agent, without more, was held to have impliedly represented himself to be still acting in that capacity (*m*). On the other hand, a man who is in fact agent or partner or confederate of another may, by conduct, represent himself to be entirely independent of him (*n*), or, by granting leases to himself under another name, may represent that there is a person who bears that name, and is distinct from himself (*o*).

62. Where it is necessary to make periodically repeated representations in order to maintain a deception once practised, and to keep the victim in his original state of delusion and false security, such representations are

(*h*) *Vide* Ch. IX, Sect. 3, Sub-s. (2), *post*.

(*i*) *Vide post*, Ch. IV, Sect. 4, Sub-s. (2).

(*k*) *R. v. Barnard* (1837), 7 C. & P. 784, where BOLLAND, B., in summing up said: "If nothing had passed in words, I should have laid down that the fact of the prisoner's appearing in cap and gown would have been pregnant evidence from which a jury should infer that he pretended he was a member of the university, and, if so, would have been a sufficient false pretence to satisfy the statute." Cp. Com. Dig. Decept. A. 3. Direct misrepresentations of personality or status are dealt with in Ch. VI, Sect. 2, Sub-s. (3). As to the Roman law on this topic, see App. C, Sect. 2, Sub-s. (2).

(*l*) *Hardman v. Booth* (1863), 1 H. & C. 803. In a modern comedy, one of the characters is a German of abnormal taciturnity, who refuses to commit himself by the use of any words at all except the "so" of his own language. Various devices are resorted to by other characters to induce him to exceed these self-imposed limits. Amongst other things, he is asked his name by one who pretends to have forgotten it. He hands his card, accompanying the act with the invariable monosyllable. This (like the handing of the card in the case cited, though not with the same fraudulent intent), and all his other communications throughout the play, are excellent illustrations of representation by acts. Cp. the personation by acts and conduct in *Cundy v. Lindsay* (1878), 3 App. Cas. 459, cited in note (*o*) to § 89, *post*.

(*m*) *Higsons v. Burton* (1857), 26 L. J. (EXCH.) 342.

(*n*) *Moens v. Heyworth* (1842), 10 M. & W. 147, where it was held that it was for the jury to say whether a party, by the act of exhibiting an invoice stating goods to be of first shipping quality, had or had not impliedly represented that the shippers so stating were independent persons, and not mere agents or partners (*per* Lord ABINGER, C.B., at p. 156, PARK, B., at p. 156, who speaks of a representation "by words or acts," and ALDERSON, B., at pp. 156-158); *Blake v. Albion Life Assurance Co.* (1878), 4 C. P. D. 94, where an agent and confederate of the defendant company by conduct assumed and pretended to be another person having no connection with it.

(*o*) *Marnham v. Weaver* (1899), 80 L. T. 412.

frequently made by acts and conduct alone; as, for instance, by regularly transmitting to the party entitled the exact amount which would represent interest payable under a mortgage, as if the mortgage had been effected according to the instructions of, and with the moneys deposited by, the other party (*p*), or by producing, without handing over, the title deeds of the property supposed to have been mortgaged (*q*); which acts are, of course, so many implied representations that the moneys deposited have been invested as required.

63. Further, the practice of employing puffers at auction sales (*r*), the various modes of "passing off" goods, by "dressing" and "making up" (*s*), the "invitation" and "trap" cases (*t*), and the various forms of malingering and cheating (*u*), all of which are dealt with elsewhere in their appropriate places, may be treated as species of representation by conduct.

64. Other illustrations of a miscellaneous and unclassifiable character are the following. A man, in order to induce a lady to marry him, procures his brother to give him a note for a large sum of money as the pretended balance of account due to him. The production of this note was held an implied representation to the lady of possession of property to the amount of the note (*x*). A man procures another to become the apparent owner of a farm: he may thereby represent him to be a person of substance (*y*). A woman by her conduct assumes to possess magical powers: this of itself is a "pretence," for "it is not necessary that the false pretence should be made in express words; if the idea is conveyed," and "her acting as 'a cunning woman,' coupled with all that passed," and her "conduct and conversations" evidence such a pretence (*z*). Two curious cases of the utilization of ambiguous objects of sense, as instruments of misrepresentation, are the following. A man sent to a public place for the sale of bullocks and heifers three animals, one a bullock, one a heifer and the other a hermaphrodite, or *lusus naturæ*, having some of the properties of a male and others of a female. This was held a representation by conduct that the animal was either a bullock or a heifer (*a*). So, the sale of an article by a dealer in antiques was regarded as in itself, and apart from the express statements accompanying the act, an implied representation that the article was a curio of some kind.

(*p*) *Blair v. Bromley* (1847), 2 Ph. 354; *Moore v. Knight*, [1891] 1 Ch. 547; and *Thorne v. Heard and Marsh*, [1895] A. C. 495, H. L. (*per* Lord DAVEY at p. 506).

(*q*) *Re Murray, Dickson v. Murray* (1887), 57 L. T. 223.

(*r*) *Vide post*, Ch. XIII, Sect. 2, *post*.

(*s*) *Vide post*, Ch. XIV, Sect. 1, Sub-s. (5), *post*.

(*t*) See § 145, and § 183, *post*.

(*u*) Many of these are statutory offences: see § 397, *post*.

(*x*) *Montefiori v. Montefiori* (1762), 1 W. Bl. 362 (Lord MANSFIELD, C.J.).

(*y*) *O'Herlihy v. Hedges* (1803), 1 Sch. & Lefr. 123; 9 R. R. 23.

(*z*) *R. v. Giles* (1865), 34 L. J. (M. C.) 50, *per* BLACKBURN, J., at p. 53.

(*a*) *Gill v. M'Dowell*, [1903] 2 Ir. R. 463, *per* Lord O'BRIEN, C.J., at p. 467, and GIBSON, J., who, at p. 469, says rather unkindly to the wretched freak, who, after a brief, miserable, and blameless, life, must needs be defamed in death: "the animal was misleading, a sort of living lie . . . the beast told its own lie: it was a machine of fraud which the defendant utilized."

The article itself was a "silent asserter," and it was a case of *res ipsa loquitur* (b).

65. Indictments for false pretences present numerous analogies. Some of these cases have already been referred to (c).

66. Of course no implication of a representation from acts and conduct arises where the only statement which can be implied does not fulfil the other conditions and requisites of a representation, as stated in Chapter II, either because the implied statement is not a statement to the effect alleged (d), or because it is not a statement to the alleged representee, or to any person in particular, such as the simulation of wealth by "keeping up appearances" (e), or the miser's pretence of distress and penury (f), which, without more, no individual could claim to have been a statement made to himself, or on the faith of which, as so made, he acted to his detriment.

(b) *Patterson v. Landberg* (1905), 7 F. 675, per Lord KILLACHY at p. 681.

(c) See Lord Halsbury's *Laws of England*, title, "Criminal Law and Procedure," vol. ix., pp. 690-704; and § 397, in Ch. XIII, Sect. 3, *post*.

(d) *Beattie v. Ebury* (Lord) (1874), L. R. 7 H. L. 102, was a case of this kind. See the observations of Lord CAIRNS, L.C., at pp. 109-112, Lord HELMSFORD at p. 121, and Lord HATHERLEY at p. 128.

(e) When Bassanio, not without an eye to the fair Portia, was showing "a more swelling port Than his faint means would give continuance," he was not making a direct representation to the lady, such as was made in *Montefiori v. Montefiori* (*ubi sup.*). From general appearances, individuals who ask no questions, and therefore receive no crooked answers, whether by words or acts, must draw their own conclusions at their peril. Lord BROUGHAM, at p. 531 of *Burnes v. Pennell* (1849), 2 H. L. C. 497, observes that "it is not every false representation by acts and deeds . . . that would vitiate any contract that may be made" on the faith of it, and he proceeds, at pp. 532, 533, to give an illustration of an owner of land making a pretence of the general prosperity of his estate and tenantry, by remitting rent to the tenants, and says that no one purchasing on the faith of these "appearances" could claim that they constituted a misrepresentation.

(f) Instances will readily occur to any one, from ordinary life and history, of professional men or tradesmen rashly drawing inferences from a display of all the outward and visible signs of poverty by wealthy and mean men and women, inferences which induce them to make reductions in their charges, or to grant time, or consent to compromises of their claims, but inferences of their own drawing from mere general appearances, and on which, therefore, they could found no cause of action.

CHAPTER IV.

MISREPRESENTATION.

67. A REPRESENTATION which when made, or, in the case of a continuing representation, when acted upon by the representee, was false in fact, is in law a misrepresentation (see Article 10). This involves consideration of the questions of (1) the constituents of falsity, (2) the date or dates at which the falsity must be shown, and (3) the canons of construction applied for the purpose of determining whether a representation is to be deemed false or true.

SECT. 1. WHAT CONSTITUTES FALSITY IN FACT.

68. For the purposes of the present discussion, the knowledge or belief of the representor, all-important as this matter is, when the question of fraud or innocence comes to be considered (see Chapter V), is wholly irrelevant. Falsity in fact is all that need be established to show a misrepresentation. A man may unintentionally make a misstatement. He may also unintentionally make a correct statement, and, in so doing, behave "like white witches, mischievously good" (*a*). But neither is the former representation thereby made true, nor the latter false. The modest claim of Autolycus that he is "sometimes honest by chance" (*b*) may be a difficult one to make good; but it is quite certain that a man may tell the truth sometimes by chance (*c*). And, if he does tell the truth, however much he intended to lie, he has made no statement which can ever be actionable (or indictable, either, as a false pretence), or as to which, therefore, there can ever be any occasion to institute the further inquiry which otherwise would follow, as to the state of the representor's mind, the inducement to the representee, and the like, inasmuch as the first condition of all has not been satisfied. "Although the accused," said BRETT, J.A., in a criminal case, "had a criminal intent and believed his statement was false, yet if *in fact* by chance the statement was not incorrect, the charge is not supported" (*d*). So, in a civil case, where the defendant had made an implied representation that the plaintiff

(*a*) Dryden in "The Medal," aiming at Lord Shaftesbury.

(*b*) "Winter's Tale," Act IV, Sc. 4.

(*c*) Cicero (De Div. II, 11) speaks of "testes" who "*casu veri aut malitiâ falsi fictique esse possunt*."

(*d*) *R. v. Aspinall* (1876), 2 Q. B. D. 48, C. A., at p. 58.

would have the right to sell liquor off the premises, if he acquired them, the representation which, so far as he knew, was false (there being, to his knowledge, restrictive covenants in a previous conveyance), turned out to have been, *malgré lui*, true all the time, because no one during a period of twenty-six years since the date of the conveyance had interfered with the sale of liquor off the premises, and the defendant, on that ground, was held entitled to judgment (e). An averment that a representation had been made which the representor believed to be false, without averring that it was false in fact, would be as demurrable as the "double plea," in a case already cited, where it was pleaded that the opposite party had entered into a contract with the fraudulent intention of breaking it, without adding that he had broken it in fact (f). To the question—misrepresentation or no misrepresentation—the nice distinctions which philosophers or philologists draw between objective and subjective truth (g), or, as Lord BRAMWELL put it, between "absolute" and "contingent" truth (h), and all considerations of the personal equation, are wholly immaterial. Objective, not subjective, truth is alone relevant. The *falsum*, not the *falsus*, is, at this stage, the sole subject of the inquiry.

69. Since in any form of proceeding a misrepresentation must be established, it follows that the burden of alleging and proving falsity in fact, which alone turns a representation into a misrepresentation, rests on the party who sets it up, whatever the form of proceeding may be (i). Whether a representation is false or not, if there is any evidence, is of course a question of fact (k).

SECT. 2. SUBSTANTIAL FALSITY NECESSARY AND SUFFICIENT TO PROVE A MISREPRESENTATION.

70. Falsity and truth are, for the purposes of the law, opposites and mutually exclusive. What is not true is false, and what is not false is

(e) *Hepworth v. Pickles*, [1900] 1 Ch. 108. So, in *Re an Arbitration between F. Tiedemann v. Ledermann Frères*, [1899] 2 Q. & B. 66, the implied representation of a certain person that he had a principal who was in a position to assume the obligations of his contract, turned out, *malgré* the representor, to be true.

(f) *Vide* § 26, *ante*. The same is true of a plea of justification in cases of libel and slander. See Article 25 of the author's *Code of Actionable Defamation*, and note (l) thereto.

(g) See App. A, Sect. 5, Sub-s. (1), *post*.

(h) *Derry v. Peek* (1889), 14 App. Cas. 337, H. L., at p. 348.

(i) *Vernon v. Keys* (1810), 12 East, 632, affirmed (1812) 4 Taunt. 488, Exch. Ch., where, after verdict for the plaintiff, judgment was arrested on the ground that no unequivocal falsehood had been proved; *Hallows v. Fernie* (1868), 3 Ch. App. 467, *per* Lord CHELMSFORD, L.C., at p. 477 ("the precise representation must be distinctly stated"); *Bodger v. Nicholls* (1873), 28 L. T. 441, where there was no proof of the unsoundness of the animal, assuming there to have been an implied representation of its soundness; *Melbourne Banking Corporation v. Brougham* (1882), 7 App. Cas. 307, P. C., at pp. 314, 315; and *Smith v. Chadwick* (1884), 9 App. Cas. 187, H. L. (*per* Lord SELBORNE, L.C., at pp. 190-192). (p. the criminal cases, such as *R. v. Perrott* (1814), 2 M. & S. 379, where, there being no allegation that any *specific* material pretence was false, the indictment was held bad, and *R. v. Aspinall, ubi sup.*, *per* BRETT, J.A., at p. 57. And see generally the cases cited in the notes to this chapter.

(k) For whether the fact corresponds with the statement, must, obviously, and *ex vi terminorum*, be a question of fact, but, on the other hand, it is a question of law

true. The question therefore—what is falsity—depends on the question which, though in another application, “jesting Pilate” asked *ex cathedrâ*, but “stayed not for an answer.” That answer, for the purposes of the law of misrepresentation, has been given by English jurisprudence in reasonably plain terms. Truth, as has already been pointed out, is not truthfulness: verity is not veracity. Neither is it mathematical truth. In science, absolute exactitude alone is truth, and a departure from it by a hair’s breadth is error. To speak of De Moivre’s theorem, or a proposition in Euclid, or the law of gravitation, as being substantially or practically true, or, in the cautious language of the undergraduate, “one in favour of which there is much to be said,” would be an absurdity. But, in the case of communications between man and man for the purpose of influencing conduct, there are necessarily degrees of truth and falsity. The facts may correspond with the statement entirely, or partially, or not at all. The important features may be correctly described, whilst the unimportant details are misstated, or *vice versâ*. Yet since, for the purpose of determining legal liability, law must resort to dichotomy and set over against one another the two categories of falsity and truth, in one or other of which every representation is to be included, it follows that some criterion, other than the scientific (which is obviously inapplicable), must be adopted for deciding which of the only two possible characters must be assigned to any particular representation. That criterion (see Article 11) is fixed by reference to the effect of the statement on the mind of the representee. The question is—was it, *as between him and the representor*, true or false? The answer depends on whether the *material* particulars were correctly or incorrectly stated. That is to say, if the discrepancy between the facts as represented, and the facts as they existed, is such as would have reasonably influenced the mind of a normal representee in considering whether or not to alter his position as he did, the representation is false, if otherwise true. This is one way of stating the rule. Another (which is perhaps the commoner form, but amounts to exactly the same thing) is to say that falsity *in substance* is, on the one hand, necessary, and, on the other, adequate to establish misrepresentation; for “substance” is here applied to those features in the statement which were intended to have, and had, an effect on the representee, or, in other words, which to him appeared—reasonably appeared, of course—material. The two forms of the rule are combined in its statutory application to contracts of marine insurance (*l*). A similar principle governs that part of the law of defamation which relates to the plea of justification (*m*).

71. It results from the above that where the entirety of a representation

whether there is any evidence of facts either contradicting, or supporting, the statement, as the case may be.

(*l*) See sect. 20 (4) of the Marine Insurance Act, 1906 (6 Edw. 7, c. 41): “a representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.”

(*m*) See the author’s *Code of Actionable Defamation*, Article 26, Rule 2, and notes thereto.

forms a faithful picture or transcript of the facts, its truth is established and is not affected by any number of inaccuracies in unimportant details. These are matters of mere fringe and superficialities, the sort of "errors" which "like straws upon the surface flow." "He who would search for" falsity "must dive below." On the other hand, if the general impression conveyed is false, the utmost precision and the most punctual and scrupulous accuracy in a number of immaterial minutiae will not avail to stamp the misrepresentation with the sign of truth: on the contrary it may be treated as part and parcel of the misrepresentation, and as an instrument of fraud as well (*n*). The difference in this respect between a misrepresentation and a breach of warranty, where exact correspondence between sense and fact is the very thing contracted for, was insisted upon by Lord MANSFIELD (*o*), and, since his time, there have been numerous illustrations in the books of the rule that proof of falsity in the substance (understood as above) of a representation is proof of its having been a misrepresentation. Less than this will not suffice: more is not required (*p*).

72. No falsity is "substantial" which does not amount to falsity in relation to the very fact actually or impliedly stated. In the case of statements of intention, opinion, or law, which only involve or presuppose a very limited statement of fact, as has already been indicated, this proposition (which, as applied to other types of statement, may seem a truism) becomes of great importance (*q*). In such cases, the existence of the intention, opinion,

(*n*) Like the conspicuous and blatant honesty of the first few games with which the cardsharp deludes his victim, or the innocent details of his performance to which the prestidigitateur diverts the audience's attention when the actual trick is being enacted. "Fraus fidem in parvis sibi praestruit ut, quum operæ prebium sit, cum mercede magnâ fallat": Q. Fabius Maximus, *apud Liv.*

(*o*) *Pawson v. Watson* (1778), Cowp. 785, at pp. 788-790. Cp. *Atwood v. Small* (1838), 6 Cl. & Fin. 232, *per* Lord BROUGHAM at p. 444, and Lord BLACKBURN's observations at pp. 683, 684, and Lord WATSON's at p. 689, of *Thomson v. Weems* (1884), 9 App. Cas. 671, H. L., and those of RIGBY, L.J., at pp. 141, 142 of *Hambrough v. Mutual Life Insurance Co. of New York* (1895), 72 L. T. 149, C. A.

(*p*) *Dobson v. Sotheby* (1827), M. & M. 90 (a fire insurance case, in which the premises had been described as a barn, where Lord TENTERDEN, C.J., at p. 92, directed the jury to consider whether the description, though not strictly accurate, was substantially so, having regard to its effect on the mind of the insurer in estimating the risk); *Adamson v. Eviatt* (1830), 2 Russ. & M. 66 (in which LEACH, M.R., considered a statement "substantially" correct which referred to a man as having an annual income of "about £1000," though in fact he had only £900); *Denton v. McNeil* (1866), L. R. 2 Eq. 352 (inaccurate statements as to an invention held by ROMILLY, M.R., not to have been substantial or material, and action accordingly dismissed); *Bear v. Stevenson* (1874), 30 L. T. 177, P. C. (where the representation was that only one incumbrance existed on certain sheep and wool: in fact there were two others, but the instruments created by them had been handed back by the incumbancers to the representors, on the understanding that they should be, as they afterwards were, satisfied out of the advance then being negotiated for: held not false in substance, though not literally true); *McKeown v. Bouchard-Peveril Gear Co.* (1896), 65 L. J. (CH.) 735, C. A. (where as to certain of the representations, there were "inaccuracies" merely, or "trifling errors," or "trivial" mistakes, which, therefore, did not make the representations false: *per* LINDLEY, L.J., and LOPES, L.J., at p. 736, and RIGBY, L.J., at p. 737); *Seddon v. North-Eastern Salt Co.*, [1905] 1 Ch. 326 (where JOYCE, J., at p. 335 held that there was no proof that a balance-sheet showing a certain result was substantially, though it was strictly, incorrect); and *Brookes v. Hansen*, [1906] 2 Ch. 129 (*per* JOYCE, L.J., at pp. 137, 138).

(*q*) See § 16 (as to the statements of intention), § 33 (as to statements of

belief, or expectation being the only fact which is stated, and also in cases where the representor qualifies his statement by "so far as I know," or similar expressions, the only falsity which can be shown necessarily involves dishonesty also. Bad faith is untruth, and similarly innocence is truth (*r*). This in no way negatives the statement (see § 68) that the representor's condition of mind is irrelevant to the question of falsity or truth in fact, because it so happens that, in the class of case under consideration, the representor's belief or intention is the fact which is either truly or untruly represented,—the curtain *is* the picture.

SECT. 3. WHEN THE FALSITY MUST BE SHOWN TO HAVE
EXISTED.

73. It is commonly said that the representation must be shown to have been false when made. But this is not quite correct. The only real issue is—was it true or false when it was acted upon? The question is whether the representee was deceived, misled, or damaged. And this question can only be answered by reference to the point of time at which he altered his position on the faith of the representation. If at this point of time, assuming it to be later than the date when it was made, the statement (which in that event would be a continuing one) was not a true portrait or transcript of the facts *then* existing, the representee is injured, however closely, when made, it may have corresponded with the facts existing at that earlier date. Conversely, however false when made, the representation, if true when acted upon, would leave the representee without any possible cause of action or ground of complaint. The abovementioned incorrect mode of stating the proposition comes down to us from a simpler age when it almost invariably happened either that the making of the statement and the acting upon it were synchronous, or that the facts were the same at both dates. The inexactitude does no practical harm when applied to such cases, but, in relation to continuing representations, where the facts are not the same at the two dates, it has a distinct tendency to mislead. A continuing representation is deemed to be made and repeated during every moment of the interval of time which separates the first statement from the representee's alteration of position, where there is any such appreciable interval. Like a continuing offer, in the case of a contract (*s*), it may be withdrawn altogether or modified at any time before it is acted upon, but, unless so withdrawn or modified, and, if modified, subject to the modification, it endures until that time (*t*).

opinion), and § 38 (as to statements of law), and the cases cited in the notes thereto respectively. See also § 98, *post*.

(*r*) See, again, § 98, *post*. This rule, as applied to representations in marine insurance, is neatly expressed in Sect. 20 (5) of the Marine Insurance Act, 1906 (6 Edw. 7, c. 41): "a representation as to a matter of expectation or belief is true if it be made in good faith."

(*s*) Cp. (amongst numerous other cases) *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256, C. A., *per* LINDLEY, L.J., at p. 262.

(*t*) See *Smith v. Kay* (1859), 7 H. L. C. 750, where the acceptance of certain bills was procured by misrepresentation, for which bills a bond was afterwards substituted, and, in answer to the argument that the plaintiff was not induced to execute

And any revocation or correction must be in the most clear and explicit terms (*u*).

74. During the abovementioned intervening period the situation may be altered in two ways. The representor may discover that what he believed to be true when making the statement was in fact *at that time* untrue; or circumstances may supervene which render a statement, true when made untrue when acted upon. The former class of case is discussed elsewhere (*x*); it has no concern with the present discussion, inasmuch as, in such cases, no question of supervening falsity arises; what was originally false remains false, and the representor's subsequent discovery can only have the effect (if anything) of turning innocence into fraud. But, in the latter class, the subsequent events convert a true representation into something which, whether to be regarded as fraudulent or not (*y*), is at all events a misrepresentation in fact, unless the representor supplements it by such timely modifications as will render it in accord with the new facts. Thus, where a bankrupt's interest in certain property was subject to (*inter alia*) his wife's life interest, and the bankrupt's assignees, in attempting to sell the bankrupt's interest, described its nature, but before the contemplated purchaser contracted to purchase, the wife died, without the assignees disclosing this fact, the description was false at *the date of the purchase*, and Lord ELDON, L.C., set aside the sale (*z*); and where, in a case of a fire insurance, the party had added a third story to the premises after his original statement (which merely described the premises as they then existed), the representation became false when acted upon, and the policy was held not enforceable (*a*). So, if directors of a company, announced as such in the prospectus, retire *before allotment*, the representation

the bond by any false statement, Lord CHELMSFORD, at p. 769, said: "it is a continuing representation. The representation does not end for ever when the representation is made. The . . . young man . . . in stating his case, would say, Before I executed the bond I had been led to believe, and I therefore continued to believe, that . . . etc." As to the right of the representor to withdraw or modify within the limits of the interval mentioned, see *Holland v. Manchester and Liverpool District Banking Co.* (1909), 25 T. L. R. 386 (as to an erroneous entry in a pass-book which, it was there held, can be set right by the banker at any time before the customer draws upon his supposed balance, but unless and until so corrected, is a continuing representation), with which compare (as applied to marine insurance) the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 20 (6): "a representation may be withdrawn or corrected before the contract is concluded." Article 9 of the Code gives a definition of a continuing representation.

(*u*) See the observations of Lord HALSBURY, L.C., at p. 370, COTTON, L.J., at pp. 371, 372, and LINDLEY, L.J., at p. 373 of *Arnison v. Smith* (1888), 41 C. D. 348, C. A.

(*x*) *Vide* § 102, *post*. Both classes are referred to by FRY, J., at p. 475 of *Davies v. London and Provincial Marine Insurance Co.* (1878), 8 C. D. 469.

(*y*) *Vide* §§ 103, 106, *post*.

(*z*) *Turner v. Harvey* (1821), Jac. 169; 23 R. R. 15.

(*a*) *Sillem v. Thornton* (1854), 3 E. & B. 868, at pp. 882-884, where it was said that the "warranty" (the language used would equally apply to a representation) was a "continuous one." There seems some reason to think that the court may have intended to go even further than the proposition in the text, and may have thought that the warranty or representation would continue during *the currency of the policy*, that is, beyond the expiration of the interval mentioned. If so, and to that extent, the decision is overruled by *Thompson v. Hoffer* (1860), E. B. & E. 1033, Exch. Ch., at p. 1049. The

is false at the latter, which is the only material, date (*b*): not so, however, where the retirement is *after* allotment (*c*). On the same principle, where a man sells a horse by auction, describing it truly as his property, but, while the auction is proceeding, it is sold privately, and the vendor notwithstanding authorizes the sale to continue, he is deemed to continue therewith his description of the horse as his property, and the person who eventually purchases on the faith of his continuing representation is entitled to rescind the contract (*d*).

75. Conversely, a representation which was false when made may in virtue of supervening facts become true when acted upon, in which case there is no falsity at the only material date, and therefore no misrepresentation. Thus, where a statement in a prospectus that more than half the shares had been subscribed for, which was untrue at the date of the issue of the prospectus, became true before allotment to the representee, and even before his application, the shareholder obtained no relief (*e*).

SECT. 4. CANONS OF CONSTRUCTION FOR PURPOSE OF DETERMINING QUESTION OF FALSITY.

76. In Article 12 of the Code three Rules of construction are set out, which are to be applied where the falsity or truth of any representation is in issue. The first of these relates to the sense in which the words, or other signs constituting the representation, are to be understood; the second, to the effect of omission and silence; the third, to the necessity of considering any complex representation as a whole, and not piecemeal.

Sub-sect. (1). Sense in which a Representation is to be understood.

77. A representation is understood in the sense in which it was reasonably understood by the representee. What the representor professes to

representation most certainly does not last a minute beyond the act whereby the representee has irrevocably altered his position in the manner alleged. See the case cited in note (*c*), *inf*.

(*b*) *Re Scottish Petroleum Co., Anderson's case* (1881), 17 C. D. 373, *per* MALINS, V.-C., at p. 377, distinguishing the case cited in the next note; and *Re Scottish Petroleum Co., Wallace's case* (1883), 23 C. D. 413, C. A., where the Court of Appeal, disagreeing in this point with KAY, J., held that the contract to take shares was voidable by reason of the representation having become false before allotment; see the observations of BAGGALLAY, L.J., at p. 432, LINDLEY, L.J., at p. 435, and FRY, L.J., at p. 438.

(*c*) *Hallows v. Fernie* (1868), 3 Ch. App. 467, where Lord CHELMSFORD, L.C., at p. 472, pointed out that the retirement of the directors in question *after* allotment could not possibly make the representation false, even as a continuing representation.

(*d*) *Whurr v. Devenish* (1904), 20 T. L. R. 385. With the cases cited under this Section, the authorities on the liability by estoppel of a partner who retires from a firm without notifying his retirement may be compared; see those cited in the various treatises on partnership, and particularly *Goode and Bennion v. Harrison* (1821), 5 B. & Ald. 147, *per* BAYLEY, J., at p. 158, who speaks of the retiring partner in that case "having done nothing to correct the mistake," and of his "suffering that delusion to continue," and points out that such a person "may protect himself from the consequences of that misrepresentation by giving notice," etc. On the whole, it is submitted that the date at which alone falsity is material, in the case of a continuing representation, is correctly stated in Article 10 of the Code.

(*e*) *Ship v. Crosskill* (1870), L. R. 10 Eq. 73, *per* ROMILLY, M.R., at pp. 85, 86.

have meant or intended, when making it, is wholly immaterial (*f*). But the representee cannot establish falsity by putting an unnatural or strained interpretation upon the words used, however clearly he may prove that in fact he so understood them. *Prima facie* the meaning deemed to have been conveyed is the primary, *i.e.* the natural, customary, and ordinary meaning,—that which would be conveyed to a normal person (*g*). It is no more sufficient to prove an understanding in a particular sense, unless that sense was a possible one, than it is to prove a natural sense, without also proving that in fact the representation was understood in that sense.

78. But, as in the case of the law of defamation (*h*), though, in the absence of special circumstances, the primary meaning is assumed to have been that in which the representee accepted the statement, it is nevertheless open to either party to allege and prove the existence of such special circumstances, and that in virtue thereof, a secondary, *i.e.* a trade, technical, conventional, or wholly unnatural sense, was conveyed to the mind of the representee. Such secondary sense may operate either to render false what otherwise would be true, or to render true what otherwise would be false.

79. Apart from technical, trade, or conventional meanings (*i*), it may be shown that the representor wished and intended the representee to affix, and that the representee did in fact affix, a special and unnatural sense to the expressions used. “We wilfully deceive,” says Paley (*k*), “when our expressions are not true in the sense in which we believe the hearer apprehends them,” and Lord CAMPBELL, L.C. (referring perhaps to Paley amongst other “moralists”), observes that “moralists and jurists tell us that words are to be understood in courts of justice in the sense in which persons using them wished and believed that they should be understood by the

(*f*) See *Greenwood v. Leather Shod Wheel Co.*, [1900] 1 Ch. 421, C. A., *per* LINDLEY, M.R., at p. 434. Cp. *Glazier v. Rolls* (1889), 42 C. D. 436, C. A., where KEKEWICH, J., at p. 454, said that the representee having construed the representation in the sense alleged and proved by him, which was a reasonable sense, and in which it was false, it was no answer to say that the representor meant by his own statement something else, which would have been true. The C. A., who reversed the judge on another ground, did not disagree with him on this point. See also *Angus v. Clifford*, [1891] 2 Ch. 449, C. A.

(*g*) The primary meaning is not necessarily the literal meaning; it is not so where the customary sense is different. Paley (*Principles of Moral and Political Philosophy*, vol. i, ch. xv) has some judicious observations on this head: “As there may be falsehoods which are not lies, so there may be lies without direct or literal falsehood. An opening is always left for this species of prevarication, where the literal and grammatical signification of a sentence is different from the popular and customary meaning . . . it is absurd to contend for any sense of words in opposition to usage, for all senses of all words are founded upon usage, and upon nothing else.”

(*h*) These rules are stated and commented upon in Part IV. of the author's *Code of Actionable Defamation*. Every canon of construction there stated for the purpose of determining whether matter published is defamatory or not is applicable, *mutatis mutandis*, to the determination of questions as to the falsity of representations.

(*i*) As, *e.g.*, *Woodhouse v. Swift* (1836), 7 C. & P. 310, where ALDERSON, B., received evidence as to the conventional meaning in the trade of “sound timber.”

(*k*) *Moral and Pol. Philos.*, vol. i, ch. xv.

person to whom they were addressed" (*l*). In this way truth itself may be made the minister of deception, just as it may become the instrument of malice; and a man may lie by telling the truth. "This may be illustrated," said ALDERSON, B., "by an anecdote of a very eminent ambassador, Sir Henry Wotton, who when he was asked what advice he would give to a young diplomatist going to a foreign Court, said, 'I have found it best always to tell the truth, as they will never believe anything that an ambassador says, so you are sure to take them in.' Now Sir Henry Wotton meant that he would tell a lie. This, no doubt, was only said as a witticism, but it illustrates my meaning" (*m*).

80. The above observations apply to representations to which only one sense (if a primary one) is applicable, or (if secondary) is sought to be applied. More difficult questions arise when the words are *ancipitis sensus*,—genuinely and reasonably susceptible of more than one meaning. In all such cases, no less than when a single secondary sense is assigned, the burden both of allegation and of proof is on the representee, who must first aver, and then prove, in what sense he understood the expressions used, and that the representation was false in that sense. The stringency of this rule has been long recognized, and illustrated by a considerable chain of examples. Indeed, in one instance, so necessary was it considered by the pleader to allege the meaning put upon the words of the representation (which was that certain designs of silk handkerchiefs had been registered) that an elaborate "innuendo," spread over thirteen lines of print, was pleaded in the declaration (*n*), whereupon it was solemnly argued for the defendant (as if the case had been one of defamation) that the innuendo was heavier than the words could carry, on which the court observed that "the objection that the innuendo is larger than the representation is answered by the remark that no innuendo is required" (*o*). Nor was it, perhaps, in that particular case; but equally no innuendo is necessary in an action of defamation, if the plaintiff is content to stand or fall by the single primary sense of the words. Where, however, there are two possible meanings, it is essential, both in the one class of action and in the other, to allege, as well as to prove, which of the two meanings is relied upon, particularly if, in the other meaning, the words are innocent of any defamatory or deceptive effect respectively. Though in the one case it is, and in the other it is not, usual to apply to such an averment the term "innuendo," this can make no difference in principle; so that the pleading referred to, though quaint and startling at the first blush, was in reality based on a sound analogy.

81. The rule last stated has been applied to the following circumstances. A statement by the representor that his intended partners would not give

(*l*) *Piggott v. Stratton* (1859), 1 De G. F. & J. 33, at p. 50.

(*m*) *Moens v. Heyworth* (1842), 10 M. & W. 147, at pp. 158, 159. (p. Tennyson's "Harold," Act III, Sc. 1, where Stigand says: "I have heard a saying of my father Godwin That, were a man of state nakedly true, Men would but take him for the craftier liar.")

(*n*) *Barley v. Walford* (1846), 9 Q. B. 197, 199.

(*o*) *Ibid.*, p. 209.

more than a named sum for a certain property might mean either that they had in fact refused to do so, or that they were not likely to do so in the future; it was for the plaintiff to prove the former meaning, in which alone the statement would have been an unequivocal falsehood, and, not having done so, his action failed (*p*). Words in a prospectus capable of being construed either as a description of the present intention of the company to start business with a certain equipment of steamships, or as an engagement to provide itself with them in the future, were not alleged by the plaintiff to have been construed by him in the present tense, and he was therefore held not to have established any misrepresentation (*q*). Where the vendors in London of a cargo of rye at Gibraltar advertised it as "in perfect condition," and added, "by telegram," it was held that the representee had no right to assume that this meant that the cargo had been inspected, but only that a telegram stating its condition had in fact been received, which was true (*r*). A prospectus stated that no remuneration was to be given *by the company* to the directors. According to the plain meaning of the words this was true, because the directors, though they received remuneration, did not receive it from the company, but from the promoters. Assuming, however, that the representation might reasonably be construed as negating the receipt of remuneration from any one concerned with the company, it was held to be for the plaintiff to prove that he so understood it (*s*). Another representation in a prospectus that "the present value of the turnover or output of the entire works is over £100,000 per annum," was capable of importing either that the works had in some year in fact produced the amount stated, or that they were capable of doing so. In the former sense it was false; in the latter, true. The plaintiff, however, refused to say what sense he put upon the words, stating in answer to an interrogatory directed to the point, that he "understood the meaning to be that which the words obviously conveyed," and that he was "unable to express in other words what he understood to be the meaning thereof." If there had been only one reasonable meaning of the words, this would have been a proper and sufficient answer; but since there were two possible senses, and the plaintiff nevertheless elected to stand or fall by his supposed single and obvious sense, he found himself in the position of having refused even to attempt to discharge the burden which the House of Lords, affirming the C. A., held to lie upon him, of, first, assigning a meaning, and then proving that he understood, and was induced by, the representation in that sense, and that in that sense it was false (*t*). On the other hand, when a similarly ambiguous statement in a

(*p*) *Vernon v. Keys* (1810), 12 East, 632, *per* Lord ELLENBOROUGH, C.J., at p. 636.

(*q*) *Hallows v. Fernie* (1868), 3 Ch. App. 467, *per* Lord CHELMSFORD, L.C., at pp. 476, 477 ("if the words are susceptible of a different meaning, he is deceived, not by the words, but by his construction of them").

(*r*) *Schröder v. Mendel* (1877), 37 L. T. 452, C. A.

(*s*) *Arkwright v. Newbold* (1881), 17 C. D. 301, C. A., *per* COTTON, L.J., at pp. 324, 325.

(*t*) *Smith v. Chadwick* (1884), 9 App. Cas. 187, H. L., *per* Lord SELBORNE, L.C., at pp. 190-192, and Lord BLACKBURN at pp. 197-201.

prospectus that "the business had paid 17 per cent. upon the capital employed in it" was false, if the company's premiums were included in the capital, but true, if they were not, and the plaintiff put the former sense, which was a reasonable one, upon the statement, and proved that he so understood it, it was held that a misrepresentation had been proved, and the burden of proof had been discharged (*u*). A statement, in answer to a question which the representor was under no obligation to answer, as to the incumbrances on certain property of a third person, might under the circumstances, mean either that there was no such incumbrance in fact, or that there was none so far as the representor could remember: it was held that the onus was upon the representee of showing that the representation had been construed, and reasonably (not necessarily) construed, by him in the former sense, in which it would have been false, and not in the latter, in which it would have been true; in other words, of establishing an unequivocal misrepresentation. This he failed to do, and the judgment accordingly went against him (*x*). Where, in a "passing off" case, it was contended that the use of the words "Trade Mark" in the advertisements of an article involved a statement to the public that the mark had been registered, it was thought to be incumbent on the party, either to establish by evidence that the public would *reasonably* regard the representation as involving the statement in question, or, in the absence of such evidence, to show that the implication alleged was a necessary one (*y*).

82. The above type of ambiguous statement is one which throws a difficulty in the way of the representee. But there is another type of ambiguity in representation which counts against the representor, and where the onus is on him, and not on the representee. We find this type when there is evidence of the representor having resorted to ambiguous, which then becomes ambidextrous, language for the express purpose of afterwards falling back on the literal, or it may even be the plain and ordinary, interpretation of the words, though he well knew and intended that the representee should take them in another and perhaps less natural sense. The contrast is between natural and spontaneous ambiguity, and that which is artificial and premeditated. In the latter class of case, every

(*u*) *Glazier v. Rolls* (1889), 42 C. D. 436, C. A. The view stated in the text was that of KEEWICH, J., at p. 454, and was not dissented from by the C. A. who reversed his decision solely on the ground that the misrepresentation was not fraudulent, whilst agreeing that there had been a misrepresentation in fact. In *Capel and Co. v. Sim's Ships Composition Co.* (1888), 58 L. T. 807, the same learned judge, at pp. 808, 809, expresses the same opinion as to the onus which rests on the plaintiff, where the statement is capable of more than one interpretation, to allege and prove a particular sense, and that he *reasonably* understood it in that sense.

(*x*) *Low v. Bouverie*, [1891] 3 Ch. 82, C. A., *per* LINDLEY, L.J., at p. 101, and BOWEN, L.J., at p. 106.

(*y*) *Sen Sen Co. v. Britten*, [1899] 1 Ch. 692, *per* STIRLING, J., at p. 696, who, in reference to the earlier case of *Lewis's v. Goodbody* (1893), 67 L. J. 194, the report of which seems to indicate a decision *en sens contraire*, observed that he had made inquiries, and, as the result, had "some reason to believe," that evidence *was* there adduced.

presumption is made against him who uses dubious phraseology as an instrument of fraud. *Fortius verba accipiuntur contra proferentem* is, as Bacon justly observes, “a rule drawn from the depths of reason” (:), and there can be no juster application of the principle than to the interpretation of the statements of him who, without expressly or literally lying, or concealing truth, *fallendi causâ obscure loquitur* (a), or whose practice it is *spargere voces in vulgum ambiguas*. “Equivocation will undo” all such representors. The law has no tenderness for “those juggling fiends That palter with us in a double sense, And keep the word of promise to the ear, But break it to the hope,” or for the Sibyl who *horrendas canit ambages . . . obscuris vera involvens*. The ancient “oracles are dumb,” but if they yet lived to “palter with us in a double sense,” they would find as little favour in the courts as do their modern counterparts—the kind of statements sanctioned, if not encouraged, by the more questionable of the various casuistical theories of “mental reservation,” and of “the Economy” (b). “If,” said Lord ELDON, L.C., “one man understands an expression in one sense, and another in a different sense, though the court would impute to both that they understood it in the right sense, yet . . . if the expression used by one party has at all misled the other”—by which phrase he must have been referring to independent evidence that the first party intended to mislead—“it is always material in considering what a court of equity will do with the case” (c). Lord BLACKBURN similarly,

(z) Bacon’s Maxims of the Law, Reg. III, vol. vii, p. 333 (Spedding and Ellis’s edition).

(a) Dig. 18. 1. 43. 2. See App. C, Sect. 1, as to the Roman law on this topic, and cp. SHEE, J., at pp. 496, 497, of *Lee v. Jones* (1864), 17 (1 B. (N. S.) 482, Exch. Ch., who there relies on the *obscure loquitur* doctrine.

(b) Momus, in one of Lucian’s Dialogues, jeers at Apollo’s oracles, each of which required another oracle to explain it. “If you cross the Halys, you will destroy a mighty empire,” said the Delphic priestess to Cræsus. He did so, and destroyed his own, which Apollo indignantly claimed to be a vindication, not a disparagement, of the scrupulous veracity of his oracles. Many of the defences set up by the modern prospectus-monger are conceived in this vein, and not a whit less ridiculous. As to the doctrines of the “Economy,” and the *restrictio mentalis*, see App. B, Sect. 2. Paley (*Moral and Pol. Philos.*, vol. i, ch. v) lays down, in reference to deceptive promises, some sound moral propositions which would equally apply, *mutatis mutandis*, to deceptive representations: “where the terms of a promise admit of more senses than one, the promise is to be performed in that sense in which the promisor apprehended at the time that the promisee received it. It is not the sense in which the promisor actually intended it, that always governs the interpretation of an equivocal promise; because, at that rate, you might excite expectations which you never meant, nor would be obliged, to satisfy. Much less is it the sense in which the promisee actually received the promise, for, according to that rule, you might be drawn into engagements which you never designed to undertake. It must, therefore, be the sense (for there is no other remaining) in which the promisor believed the promisee accepted the promise.” Substitute here “representation,” “representor,” and “representee,” for “promise,” “promisor,” and “promisee,” and enlarge the proposition by adding that the sense must be shown to have been *in fact* so understood by the representee, and *reasonably* so understood, and there results a correct and complete enunciation of the rules relating to the construction of both the classes of ambiguous statements which are discussed in the text. Paley’s expressions were cited in argument to the Court of Q. B. in *Smith v. Hughes* (1871), L. R. 6 Q. B. 597, and approved and applied by HANNEN, J., at p. 610.

(c) At p. 176 of *Turner v. Harvey* (1821), Jac. 169; 23 R. R. 15. See § 74 for the facts of this case.

but more strongly, expresses the view that the ambiguity of a representation may be a badge of fraud, from the consequences of which it is for the representor to escape if he can, and that he cannot do so by the mere plea that the representee ought to have taken it in the other of the two possible senses (*d*). To the same effect, LINDLEY, L.J., in reference to ambiguous conditions of sale (*e*), and Lord HALSBURY, L.C., on the "ambidextrous language" of a prospectus (*f*). The canon thus enunciated has been applied in a variety of cases (*g*), the most illustrative perhaps of which is one in which, answering a lady's question as to whether she would have an unimpeded sea view from the premises she was being induced to acquire, the representor replied, with absolute accuracy in the literal sense of the words, that he was bound not to build on the intervening land. Having regard, however, to what he must have gathered from the lady's question as to her apprehensions, it was held that he deliberately framed his answer so as to remove them, and must, therefore, be taken to have intended her to understand by it that she was safe in taking the house from any such interruption as she feared, and that the representation, so construed, was false because she was not in fact protected from the event which afterwards happened, viz. the making by the representor of other arrangements with his lessor, whereby he became no longer subject to any restrictions as to building (*h*).

Sub-sect. (2). Falsity by Omissions, Silence, or Inaction.

83. It has been shrewdly said, though the poet has put the words into the mouth of a fool, that there are "those That therefore only are reputed

(*d*) *Smith v. Chadwick* (1884), 9 App. Cas. 157, H. L., at p. 201: "if with intent to lead the plaintiff to act upon it, they put forth a statement which they know may bear two meanings, one of which is false to their knowledge, and thereby the plaintiff putting that meaning on it is misled, I do not think they can escape by saying he ought to have put the other. If they palter with him in a double sense, it may be that they lie like truth; but I think they lie, and it is a fraud."

(*e*) At p. 28 of *Terry and White's Contract* (1886), 32 C. D. 14, C. A.

(*f*) *Aaron's Reefs, Ltd. v. Twiss*, [1896] A. C. 273, H. L., at pp. 282, 283. Cp. the observations of KAY, L.J., at p. 113 of *Low v. Bouverie*, [1891] 3 Ch. 82, C. A.: "if there was fraud, and the statement was intended to mislead, its ambiguity would not be a defence."

(*g*) *Turner v. Harvey (ubi sup.)*; *Pigott v. Stratton* (1859), 1 De G. F. & J. 33; *Scott v. Snyder Dynamite Projectile Co.* (1892), 67 L. T. 104, C. A., per LINDLEY, L.J., at p. 106: "the prospectus is catchy and misleading in nine-tenths of its paragraphs. It suggests that the company have acquired an existing patent, though it is possible, by subjecting it to a microscopic examination, to say that that is not what is really meant. Like the well-known introduction to the *Ingoldsby Legends*" (the reference is to Canon Barham's two humorously mystifying prefatory letters addressed "to Richard Bentley, Esq.": there is no Introduction) "it appears to say a great deal, whilst not saying anything"; and *Aaron's Reefs, Ltd. v. Twiss (ubi sup.)*.

(*h*) *Pigott v. Stratton (ubi sup.)*. Cp. the story, referred to by Paley (*Moral and Pol. Philos.*, vol. i, ch. v), when dealing with deceptive promises, of the general who promised the garrison of Sebastia that, if they would surrender, no blood would be shed, and, on their surrendering, buried them all alive; and the miserable quibble, with which Portia tickled the fancy of Elizabethan groundlings, in construing Shylock's

wise For saying nothing" (i). It is certain that there are others who, for the like reason, are reputed in law misrepresentors. Apart from cases of pure non-disclosure in the strictest sense of the term, when no falsehood is told, but some absolute duty of disclosure imposed by considerations of public policy is violated, there are cases where a man may positively lie by saying nothing, and where the circumstances are such that reticence or concealment may amount to active misrepresentation. One (and the more obvious) of the two main types of such reticence is the omission from a statement of all reference to qualifying facts, leaving what is stated to stand as an absolute, and therefore a false, representation. The other is to be found in those who "do a wilful stillness entertain," when their previous declarations or acts bid them speak, in order to remove a delusion for the creation of which they are themselves responsible. Both these classes are intended to be comprised in Article 12, Rule 2, of the Code.

84. The law requires from the representor what it requires from the witness, "the truth, the whole truth, and nothing but the truth." It is not sufficient that nothing be added to make false what would otherwise be true; the representor must not willingly omit anything which is required to render true what would otherwise be false. Such an omission amounts to that form of *suppressio veri* which not merely is equivalent to but which actually is, *suggestio falsi*. In this respect moralists, philosophers, and men of the world, are, now at all events, at one with jurists (k). The "meiosis" or "leitotes" which in ancient times was not only a figure of speech, but a recognized instrument of persuasion in the mouth of such accomplished

bond, before she fell back on the plain and sound plea of illegality ("This bond doth give thee here no jot of blood; The words expressly are 'a pound of flesh.' . . . Shed thou no blood, nor cut thou less, nor more, But just a pound of flesh").

(i) "Merchant of Venice," Act 1, Sc. 1.

(k) See Paley (*Moral and Pol. Philos.*, vol. i, ch. xv): "there may be lies of omission. A writer of English history who, in his account of the reign of Charles I., should wilfully suppress any evidence of that prince's despotic measures and designs might be said to lie"—in fact, this was just what Forster *did* afterwards say of Lord Clarendon's history—"for by entitling his book 'A History of England,' he engages to relate the whole truth of the history, or at least all that he knows of it." So Mark Pattison (*Memoirs*, p. 245) ascribes to Conington's biographer a "dexterous friendship which, without misrepresentating the facts" (sc. such facts as the biographer selected) "contrived to conceal from his readers the true history." Coleridge (*Lay Sermons*, ed. Derwent Coleridge, 1852, pp. 167, 168) enumerates among the deceits practised upon the multitude by demagogues—"stating particular facts which, dis severed from their context, enable a man to convey falsehood while he says truth," and "the display of defects without the accompanying advantages, and *vice versa*," and "the statement of positions that are true only under particular conditions to men when ignorance and fury make them forget that these conditions are not present, or lead them to take for granted that they are." But the moral and juridical view of the matter has never been more aptly expressed (though with immediate reference to the lies which defame rather than to the lies which deceive) than in the well-known lines which Tennyson puts into the mouth of the parson in "The Grandmother," who, in his sermon—

"said likewise

That a lie which is half the truth is ever the blackest of lies,
For a lie which is all a lie may be met and fought with outright,
But a lie which is part a truth is a harder matter to fight."

masters of the craft as Odysseus (*l*), and was countenanced by the casuistry of St. Alfonso Liguori (*m*), has never found favour in the more modern stages of English jurisprudence. To state a thing which is only true with qualifications known to, but studiously withheld by, the representor, is to say the thing which is not. Such a statement is a "lie," and one of the most dangerous and insidious forms of lie. "If a man," says a judge of Lord MANSFIELD's day, "professing to answer a question, select those facts only which are likely to give a credit to the person of whom he speaks, and keep back the rest, he is a more artful knave than he who tells a direct falsehood" (*n*).

85. It is not because a statement is incomplete, that it is necessarily a misrepresentation, any more than a report of a trial is necessarily deemed to fall short of a "fair and accurate report," entitling it to protection from the usual consequences of defamation, merely because it is an abbreviated version or abstract. But both in the one case and in the other, he who summarizes does so at his peril. If his summary is a faithful portrait, it is none the worse for being a miniature; if, however, the incompleteness is one-sided and partial,—if the artist *ita mentitur, sic veris falsa remiscet*, that the picture presented is out of perspective and distorted, then the pretended transcript is untrue in the one case, and "unfair" in the other (*o*). The rule is best expressed by Lord CHELMSFORD and Lord CAIRNS respectively in two of the cases arising out of the Overend and Gurney disaster. The language used by the former was: "it is said that everything which is stated in the prospectus is literally true, and so it is. But the objection to it is, not that it does not state the truth as far as it goes, but that it conceals most material facts with which the public ought to have been made acquainted, the very concealment of which gives to the truth which is told the character of falsehood" (*p*). Lord CAIRNS describes the process as "such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false" (*q*). In accordance with the above rule, the following statements, from which the following qualifying or otherwise material facts were

(*l*) See Soph. Philoct. 50–134, where Neoptolemus accurately estimates the real meaning of Odysseus' proposals, and realizes that he is being solicited to commit the double villainy of concealing what he is under a duty to reveal, as well as saying what it is disgraceful to say (θεύτερον . . . κακός Κρύπτων θ' ἂ μὴ δεῖ, καὶ λέγων αἰσχιστ' ἐπῶν).

(*m*) See, as to the doctrine of "Partial Truth," and "the Economy," App. B, Sect. 2.

(*n*) CHAMBRE, J., at p. 371 of *Tapp v. Lee* (1803), 3 B. & P. 367, cited with approval by PARK, J., at p. 403 of *Foster v. Charles*, No. 1 (1830), 6 Bing. 396. Cp. the quotation from Tennyson in note (*k*), *sup*.

(*o*) See such cases as *Frescoe v. May* (1860), 2 F. & F. 123, where the pretended report "put forward what is inculpatory, withholding what is exculpatory," and was held entirely unprotected.

(*p*) *Oakes v. Turquand*; *Peek v. Same* (1867), L. R. 2 H. L. 325, at pp. 342, 343.

(*q*) *Peek v. Gurney* (1873), L. R. 6 H. L. 377, at p. 403. Cp. the observations of JAMES, L.J., at p. 318 of *Arkwright v. Newbold* (1881), 17 C. D. 301, C. A.

respectively omitted or withheld, were deemed misrepresentations, in relation to contracts of sale and purchase :—particulars of an annuity, which were quite accurate as far as they went, without adding that the annuity was terminable in five years (*r*) ; a statement that certain farms were let, without stating that the tenants had given notice to quit (*s*) ; a plan of an estate which was correct in every respect, except that it omitted certain particular trees, though showing an indiscriminate mass of trees as intended to pass (*t*) ; particulars of sale which were silent as to a ground rent to which the property was subject (*u*) ; a statement by the defendant's solicitor that he did not know of any restrictions on the use of certain premises, without adding that he had never looked at the deeds to see if there were any (*v*) ; a description of property as " leasehold business premises," without mentioning that the lease contained restrictive covenants against certain specified businesses (*x*) ; a statement of the existence of an off-licence in respect of certain premises, which was true, omitting to add that there were covenants in a previous conveyance to the representor's predecessors in title against the user of them as an inn, tavern, or beer-house (*y*) ; an advertisement of land as " capital freehold *building* land," without any reference to the fact that the local authority had, under byelaws, prohibited building thereon until all the refuse with which certain excavations had been filled up should have been removed (*z*) ; and a proclamation of the sale of land as at the instance of the mortgagees, without any reference to the incumbrances which amounted to a sum in excess of the utmost value of the land (*a*). " In all cases of sale, it is the obvious duty of the vendor . . . to describe everything which it is material to know in order to judge of the nature and value of the property. It is not for him just to tell what is not actually untrue, leaving out a great deal that is true, and leaving it to the purchaser to inquire whether there is any error or omission in the description or not " (*b*). A second, and very fruitful, nursing ground of the type of misrepresentation under consideration is the company prospectus, and it is to these documents, perhaps, that the occasion most frequently arises to apply the rule that an omission may render the entire document so

(*r*) *Coverley v. Burrell* (1821), 5 B. & Ald. 257.

(*s*) *Dimmock v. Hallett* (1866), 2 Ch. App. 21 (*per* TURNER and CAIRNS, LL.JJ.).

(*t*) *Denny v. Hancock* (1870), 6 Ch. App. 1. See particularly the observations of MELLISH, L.J., at p. 14: " it really almost requires, to my mind, some charity . . . to suppose that he did not prepare his plan with a view of leading a purchaser to suppose the trees to be included, and omit these particular trees, in order that he might be able to say afterwards—' these were not intended to pass.' "

(*u*) *Jones v. Rimmer* (1880), 14 C. D. 558, *per* JESSEL, M.R., at p. 591, who held this to be a misrepresentation, though an innocent one, particularly having regard to the extreme precision with which all the items of receipt and profit had been stated.

(*v*) *Nottingham Patent Brick and Tile Co. v. Butler* (1886), 16 Q. B. D. 778, C. A.

(*x*) *Re Davis and Cavey* (1888), 40 C. D. 601, *per* STIRLING, J., at p. 605.

(*y*) *Hepworth v. Pickles*, [1900] 1 Ch. 108, *per* FARWELL, J., at pp. 111, 112.

(*z*) *Baker v. Moss* (1902), 66 J. P. 360.

(*a*) *Mahomed Kala Mea v. A.-V. Harperink* (1908), 25 T. L. R. 180, P. C.

(*b*) *Per KINDERSLEY, V.-C.*, at p. 430 of *Brandling v. Plummer* (1854), 2 Dr. 427 ; 100 R. R. 209.

partial and fragmentary as to be positively false (c). Another species of case inviting the application of the rule consists of imperfect and incomplete statements as to the credit and dealings of a third person (d);

(c) *New Brunswick and Canada Railway and Land Co. v. Muggeridge* (1860), 1 Dr. & Sm. 363, wherein it was held, at pp. 381, 382, that framers of prospectuses "are bound . . . not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge, the existence of which might in any degree affect the mind of any applicant for shares" (with which compare the like enunciation of the duty of prospectus-framers by FRY, J., at pp. 310, 311 of *Arkwright v. Newbold* (1881), 17 C. D. 301, C. A.); *Oakes v. Turquand*; *Peek v. Same* (1867), L. R. 2 H. L. 325, *per* Lord CHELMSFORD, L.C., at pp. 341-345, and Lord CRANWORTH at p. 368, in which the prospectus concealed the true state of the affairs of Overend, Gurney & Co., whilst stating nothing actually false: see note (p), *sup.*; *Peek v. Gurney* (1873), L. R. 6 H. L. 377 (the same prospectus, and the same decision, so far as the question of misrepresentation *in fact* is concerned): see note (q), *sup.*; *Jury v. Stoker* (1881), 9 L. R. (Ir.) 385, C. A.; *Edgington v. Fitzmaurice* (1885), 29 C. D. 459, C. A., where DENMAN, J., who was affirmed by the C. A., expressed the view, at p. 472, that the concealment of the real object of the issue (which was to pay off pressing liabilities) was sufficient to render the prospectus as a whole such a "partial and fragmentary" statement as to amount to positive falsity; *Re Mount Morgan (West) Gold Mine, Ltd., Ex parte West* (1887), 56 L. T. 622, where the prospectus stated that the company was formed to acquire fourteen acres of the famous Mount Morgan, in Queensland, and contained glowing reports of the value of the Mount Morgan property, but omitted to add that the fourteen acres did not belong to the proved auriferous portion of Mount Morgan to which alone the reports related, and where KAY, J., accordingly, at p. 623, pronounced the prospectus to be both false and fraudulent; *Derry v. Peek* (1889), 14 A. C. 337, H. L. (a statement that the company had power to use steam on their tramways, without adding that this power was subject to the consent of the Board of Trade, and two local authorities); *Scott v. Smyder Dynamite Projectile Co.* (1892), 67 L. T. 104, C. A. (reference to "firing experiments" with a projectile, without adding that the experiments took place five years previously, and related to a different patent); *Aaron's Reefs, Ltd. v. Twiss*, [1896] A. C. 273, H. L., where the prospectus omitted reference to the provisions and contents of certain material contracts, though satisfying the bare statutory requirements of the law by inserting the dates and names of the parties thereto, and it was held that the whole prospectus was thereby rendered false *at common law*, *per* Lord WATSON, at p. 287, and Lord DAVEY, at pp. 293, 294, and where documents were referred to which described the state of the mine, without mentioning that the condition described was that of the mine several years back,—see observations of Lord HALSBURY, L.C., at pp. 282, 283, as to this "ambidextrous language"; *Re Dunlop-Truffault Cycle and Tube Manufacturing Co., Ex parte Shearman* (1896), 66 L. J. (CH.) 25, where it was held by KEKEWICH, J., that the representation (implied from the company's name) that a Dunlop was connected with the company, which was true, unaccompanied by any statement that this Dunlop had no connection whatever with the famous Dunlop Pneumatic Tyre Co., amounted to a misrepresentation; *Components Tube Co. v. Naylor*, [1900] 2 Ir. R. 1, where there is to be found a luminous discussion of the whole question by PALLES, C.B., at pp. 37-60, and where, the jury having found, in answer to one of the questions left to them, that certain omissions were material, and such as to render the prospectus "as a whole, substantially misleading and calculated to deceive," the court refused to disturb the verdict; and *Cackett v. Keswick*, [1902] 2 Ch. 456, *per* ROMER, L.J., at p. 476: "wholly apart from the provisions of sect. 38, in my opinion, in common fairness to the intending investor, to whom a prospectus of this kind is issued, such a contract as we have had to deal with ought to be specified and referred to in the prospectus." See also some of the cases on prospectuses cited in Ch. XIII, Sect. 1, *post*.

(d) *Tapp v. Lee* (1803), 3 B. & P. 367; *Ames v. Milward* (1818), 8 Taunt. 637, where an assertion by the representor that one Bates had paid him well, which was literally true as regards a certain agreement between these parties, was held substantially false, by reason of the representor's silence as to his dealings with Bates generally, and the security he held of him; and *Lee v. Jones* (1864), 17 C. B. (N. S.) 482, Exch. Ch., *per* SHEE, J., at p. 498, who based his decision on the ground that the creditors had been guilty of such a "partial, inaccurate, and subdolous setting forth . . . of facts within their knowledge, material for the proposed sureties to be informed of as, along with the communication of other facts material for them to know,

and there are other, and miscellaneous, illustrations of the principle (e).

86. On the other hand, unless the omission makes the residue false, though the representor may thereby render himself obnoxious to some other rule of statutory or common law, the representation is not only devoid of fraud (f), but it is not a misrepresentation at all. "If a person relies, as a ground for rescission of a contract, on the omission of a statement, he must show that the omission of that statement makes what is stated misleading" (g).

amounted to a misrepresentation," and in the Court of C. P. below, (1863), 14 C. B. (N. S.) 386, *per* BYLES, J. ("pregnant with the *assertion* that," etc.), and KEATING, J. ("active misrepresentation"), at p. 398.

(e) Such as *Stevens v. Adamson* (1818), 2 Stark. 422; 20 R. R. 707, where the representor sold premises without informing the representee that only the day before the contract he had been served with notice of re-entry by the superior landlord unless certain repairs were executed in a specified time; *Flight v. Booth* (1834), 1 Bing. (N. C.) 370, where premises were let on the representation that there were restrictions on the use of them for the purposes of any offensive trade, and two other named trades, which was held to be a clear implied representation that there were no restrictions as to any inoffensive business except the two specified, the fact being that a large number of other inoffensive callings were prohibited (see pp. 377, 378); and *Carlisch v. Salt*, [1906] 1 Ch. 335 (concealment of the fact that the vendor had, two days before the contract, been apprised of a party-wall award against him in respect of the premises sold). See also *Brooke v. Mostyn (Lord)*, (1865) 33 Beav. 457, where the production of several relevant documents, coupled with the keeping back of a certain very material valuation, was held a misrepresentation justifying the setting aside of the compromise founded thereon; *Gilbert v. Endean* (1878), 9 C. D. 259, C. A., another compromise case, where the solicitor of the defendants stated to the plaintiff's solicitor that one of the defendants was penniless, but omitted to add that his father had died, leaving a will, and possessed of some property: which was held by BRETT, L.J., at p. 268, and COTTON, L.J., at p. 270, to amount to an absolute misrepresentation; *Mackay v. Commercial Bank of New Brunswick* (1874), L. R. 5 P. C. 394, where, in the Colonial Court, the jury had been directed that the sending of a telegram to the plaintiff in the name of one Lingley, which stated truly that certain moneys had been remitted, amounted to a misrepresentation, by reason of the omission to notify the plaintiff that the telegram had not been sent by Lingley, and that Lingley was insolvent and had absconded, and where, though it was not necessary to pronounce expressly upon the point, the Judicial Committee assumed, and clearly thought, that the direction was right; and *Boyd and Forrest v. Glasgow & S.W. Railway Co.*, [1911] Sc. Ct. of Sess. Cas. 33, where "a journal of bores" was put forward for railway contractors to tender upon, without stating that the bores had been taken by the company's servants, and that the "journal" had been added to, altered, and edited, to suit the company's purposes, by their engineer (pp. 62-74). Cp. Ch. II., Sect. 5, Sub-ss. (2) and (3), *ante*, and some of the cases cited in the notes thereto, as to misrepresentation of the effect of a document. One may also instance the daily and nightly mendacity, in this respect, which characterizes newspaper placards and "bills of contents." There was a glaring example of this some years ago when a respectable evening paper made on its placards the flamboyant announcement "war declared," in huge type and prominent position, followed by the word "imminent" in the next line in very small type which not one person in a hundred would notice, the fact being that the European war which was then possible had been "declared to be imminent" by some Fleet Street oracle, and by no one else. Again, a publishers' announcement of such and such a work by an eminent novelist, without the addendum—"and other stories," which is to be found on the title-page, but not till the book is bought, is a clear misrepresentation by which, instead of a new novel, a collection of old magazine stories, probably the immature output of the author's extreme youth, is palmed off upon the public.

(f) "No mere silence will ground the action of deceit," *per* JAMES, L.J., at p. 318 of *Arkwright v. Newbold* (1881), 17 C. D. 301, C. A.

(g) *Per* RIGBY, L.J., at p. 736, of *McKeown v. Bouchard-Peveril Gear Co.* (1896), 65 L. J. (CH.) 735. Cp. the observations of BRETT, J., at p. 199 of *Re Coal Economizing*

87. It remains to consider the other class of case abovementioned, where silence, though not in itself a misrepresentation, may, in conjunction with something previously said or done, help to convert truth into falsehood. This class comprises the three species in the next three paragraphs respectively discussed.

88. Where a man has unnecessarily said something, a duty may at once arise to say more, in which case, if he violates this duty, his reticence thenceforth becomes an implied misrepresentation, though complete silence in the first instance would not have been either misrepresentation or even actionable non-disclosure (*h*). It has already been seen that this duty arises in the case of a continuing representation, where, before it is acted upon, facts came to the notice of the representor falsifying a statement which when made was true (*i*). But there are other cases where in the course of the negotiations the party has let fall something which, whether he so intended or not, he immediately perceived to have a delusive effect on the mind of the representee, and where, by not correcting the delusion, he is deemed to confirm and perpetuate it, and so to misrepresent (*j*). In a curious case (*k*) relating to the sale of oats by sample which were in fact new oats, but

Gas Co., Gover's Case (1875), 1 C. D. 182, C. A. ("for a mere non-disclosure . . . which has not the effect of rendering that which was disclosed or stated a misrepresentation . . . there was no remedy, either at law or in equity"), and *Bentley & Co., Ltd. v. Black* (1893), 9 T. L. R. 580, C. A. (where it was held that the mere non-disclosure of the figures on which an accountant's certificate was based did not render the certificate a misrepresentation).

(*h*) *Davies v. London and Provincial Marine Insurance Co.* (1878), 8 C. D. 469, *per* FRY, J., at p. 475: "in ordinary contracts"—sc. such as are not *uberrimæ fidei*—"the duty may arise from circumstances which arise during the negotiation." He then instances such cases as subsequent discovery of falsity in the original representation, and the supervening of events which falsify facts which were true when stated. Cp. the subsequent observations of the same authority, to the same effect, in the Court of Appeal, at pp. 310, 311 of *Arkwright v. Newbold* (1881), 17 C. D. 301, C. A. See also what is said by Lord CAMPBELL, L.C., at pp. 723, 724 of *Walters v. Morgan* (1861), 3 De G. F. & J. 718, as to the "duty to say more" being created by even "a single word, or (I may add) a nod, or a wink, or a shake of the head from the purchaser," and by Lord SELBORNE, L.C., at p. 236 of *Coaks v. Boswell* (1886), 11 App. Cas. 232, where, after stating that mere silence is not deceit, unless the party "undertakes or professes to communicate" the facts withheld, he adds: "this, however, he may do, if he makes some other communication which, without the addition of those facts would be necessarily, or naturally and probably, misleading." See also the general statements (which would apply equally to all the forms of reticence mentioned in this Section) of KNIGHT-BRUCE, V.-C., at p. 104 of *Stikeman v. Dawson* (1847), 1 De G. & Sm. 90 ("a fraudulent suppression or a fraudulent concealment may be, and sometimes is, equivalent, civilly, to a false assertion fraudulently made in express terms"); of Lord ROMILLY at p. 114 of *Central Railway Co. of Venezuela v. Kisch* (1867), L. R. 2 H. L. 99 ("the suppression of a fact will often amount to misrepresentation"); and of ROMER, L.J., at p. 792 of *Seaton v. Heath*, [1899] 1 Q. B. 782, C. A. ("misrepresentation might undoubtedly be made by concealment").

(*i*) *Vide* Sect. 3, *ante*, and Ch. V, Sect. 1, Sub.-s. (4), *post*.

(*j*) *Nicholson v. Hooper* (1838), 4 My. & Cr. 179, *per* Lord COTTENHAM, L.C., at pp. 185, 186: "if Hooper had no such right"—sc. to deposit certain warrants, and give the defendants a good title to sell them for repayment of moneys advanced—"it was the duty of the plaintiff, when informed of his having assumed it, and that the defendant had on the faith of it advanced a large sum of money, to have apprised them of his intention to dispute it. Not only did he not do so, however, but . . . he confirmed them in the error into which they are supposed to have fallen, and himself derived benefit from the delusion so perpetuated."

(*k*) *Smith v. Hughes* (1871), L. R. 6 Q. B. 597.

which the purchaser believed to be old, and, therefore, commanding a higher price, BLACKBURN, J., laid down that, if the purchaser had believed not merely that the oats were old, but that the seller was contracting to sell them as old (*l*),—to which HANNEN, J., added that the seller must also be shown to have believed that the purchaser so believed (*m*),—the purchaser's refusal to pay, and consequently his defence to the action, would have been justified; *not*, however, on the ground of misrepresentation by silence on the part of the vendor, but because the parties in that case would not have been *ad idem*, and the invalidating cause would thus have been "mistake" in the strict technical sense of the word.

89. A misrepresentation may also be made by silence, when either the representee, or a third person in his presence, or to his knowledge, states something false, which indicates to the representor that the representee either is being, or will be, misled, unless the necessary correction be made. Silence, under such circumstances, is either a tacit adoption by the party of another's misrepresentation as his own, or a tacit confirmation of another's error as truth. Thus, where the plaintiff called at the office of a certain firm called Edward Gandell and Co., and one Edward Gandell presented himself in answer to his inquiry, and handed to him a card of "Thomas Gandell and Co.," knowing that this was the firm with which the plaintiff was desirous of doing business, and said nothing to remove the delusion, or to reveal the fact that the two firms were quite distinct, thereby obtaining an order for Thomas Gandell and Co. in which he was interested, this was treated as a misrepresentation (*n*); and so also was the conduct of a party in leaving uncorrected the form in which letters were addressed to him, as and for a person of good repute of somewhat similar name to his own in the same street, for whom he knew he was being mistaken by the party on whom he was attempting to foist the contract (*o*). In addition to these cases of personation by silence, there are illustrations of a violated duty to correct a delusion being held tantamount to misrepresentation, where a person stands by and allows in silence an erroneous statement made by a third person to, or in the presence and hearing of, the representee (*p*).

(*l*) *Ibid.*, at p. 608.

(*m*) *Ibid.*, at p. 611.

(*n*) *Hardman v. Booth* (1863), 1 H. & C. 803.

(*o*) *Cundy v. Lindsay* (1878), 3 App. Cas. 459, H. L., where Lord CAIRNS, L.C., at p. 465, says that "they"—the jurors—"have found that by the form of the signatures to the letters which were written by Blenkarn, by the mode in which his letters and applications to the respondents were made out, and by the way in which he left uncorrected the mode and form in which, in turn, he was addressed by the respondents; that by all these means he led and intended the respondents to believe, that the person with whom they were communicating was not Blenkarn, the dishonest and irresponsible man, but was a well-known and solvent house of Blenkiron & Co., doing business in the same street." Contrast with this case *British Linen Co. v. Cowan* (1906), 8 F. 704.

(*p*) In *Pilmore v. Hood* (1838), 5 Bing. (N. C.) 97, the defendant made a misrepresentation to a third person who (to the defendant's knowledge) communicated it to the plaintiff, the defendant meanwhile standing by and saying nothing, and this reticence was held (*per* TINDAL, C.J., and VAUGHAN, J., at p. 107) to constitute a misrepresentation to the plaintiff. Cp. *North British Insurance Co. v. Lloyd* (1854), 10 Exch. 523, where ALDERSON, B., at p. 529, expresses the view that one who knows

90. Lastly, there are cases which are usually classed as belonging to the province of non-disclosure, pure and simple, and not to that of misrepresentation, but which, nevertheless, certain very learned authorities have preferred to treat as examples of positive misrepresentation to be implied from silence. It has been held that the mere entering into any transaction of a well-known business type, without revealing matters which would be considered unusual and abnormal in such transaction, amounts to a representation that there are no such matters, and, therefore (if it be proved that in fact such matters did exist, and that the transaction was not of the regular and normal description which from the representor's silence the representee was entitled to expect) a false representation (q).

that a misrepresentation is being made by a third person, and "allows it in silence," is himself misrepresenting. Story (*Eq. Jurispr.*, vol. i, §§ 384, 390) treats such conduct as an illustration of the rule (which he neatly adapts from a well-known artistic canon) of *fraus est celare fraudem*. The doctrine is further illustrated by the analogous cases of partnership by estoppel (as to which see the treatises of Lord Lindley, and Sir Frederick Pollock). See also the observations of BLACKBURN, J., at p. 673 of *Polak v. Everett* (1876), 1 Q. B. D. 669, in referring to the estoppel rule that "if a man stands by, and allows another to act without objecting, when, from the usage of trade or otherwise, there is duty to speak, his silence would preclude him as much as if he proposed the act himself." The rule stated in the text is the same as the rule of the Digest—"Qui tacet, consentire videtur; qui potest et debet vetare, jubet si non vetat," and the moral canon stated in Arist. *Eth.* iv. 8. 8: ἡ γὰρ ὑπομένει ἀκούων, ταῦτα καὶ ποιεῖν δοκεῖ, or in the proverbial "silence gives consent." Cp. Story's *Eq. Jurispr.* vol. i, §§ 384, 385, 389, 390, on this question.

(q) *Hamilton v. Watson* (1845), 12 Cl. & F. 109, a suretyship case, *per* Lord CAMPBELL at p. 119: "I should think that this might be considered as the criterion whether the disclosure ought to be made voluntarily, namely, whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction"; *Evans v. Edmonds* (1853), 13 C. B. 777, where, in an action by a trustee of a separation deed for payment of the allowance covenanted to be paid by the husband, it was held that the proved concealment by the plaintiff of the fact that he had seduced the wife, and that the object of the deed was not the usual and ordinary object of a separation deed, but to give the plaintiff access to the wife and opportunities for continuing his clandestine intrigue, amounted to a fraudulent misrepresentation (*per* JERVIS, C.J., at p. 784, and MAULE, J., at pp. 785, 786; *Lee v. Jones* (1864), 17 C. B. (N. S.) 482, Exch. (h., a suretyship case, where at p. 500, SHEE, J., cites the above dictum of Lord CAMPBELL, and BLACKBURN, J., at pp. 503, 504, says: "I think, both on authority and on principle, that, when the creditor describes to the proposed surety the transaction proposed to be guaranteed (as in general a creditor does), that description amounts to a representation, or at least is evidence of a representation, that there is nothing in the transaction that might not naturally be expected to take place between the parties to a transaction such as that described. And, if a representation to this effect is made to the intended surety by one who knows that there is something not naturally to be expected to take place between the parties to the transaction, and that this is unknown to the person to whom he makes the representation, and that, if it were known to him, he would not enter into the contract of suretyship, I think it is evidence of a fraudulent representation on his part"; *Phillips v. Foxall* (1872), L. R. 7 Q. B. 666, where the same eminent authority observes (at p. 679): "I still adhere to the opinion that I expressed in *Lee v. Jones*, that if such a transaction as is alleged in the plea had taken place before the defendant entered into the contract of suretyship, and had been concealed from him, it would have furnished evidence of a false representation to the surety that no such thing existed"; though he adds, "further than this, I am not at present prepared to go, and it must be remembered that a minority in the Exchequer Chamber refused to go so far"; and *Bentinck v. Fenn* (1887), 12 App. Cas. 652, H. L., a case involving the question of the duty of disclosure owed by an agent to his principal, where Lord MACNAGHTEN, at p. 671, discusses the position of the agent who is alleged to have concealed his interest, "and so to have represented that he was not interested in the property, and that it belonged to other persons who were not connected with

91. In no other class of case than those already mentioned is silence tantamount to a representation, or actionable in law or equity *as such*, however amenable it may be to the civil consequences of a breach of the duty of disclosure which arises in transactions *uberrimæ fidei*, under another head of jurisprudence, or however censurable it may be *in foro conscientie* (r). It is not silence, or reticence, which in itself can amount to a misrepresentation. It must be *concealment*, or *suppressio veri*. And these terms import the existence of a duty. A man cannot be said to conceal what he is not bound to reveal, suppress what he is under no duty to express, or keep back what he is not required to put forward. This distinction is insisted upon in a famous passage from Cicero (s), which has been constantly cited as the basis of many of the most important judgments on misrepresentation, whether at law and in equity (t). There must be a duty of some sort to speak, arising out of the circumstances, in accordance with some one or other of the principles enumerated in this Section, before the representee can legally complain of the representor's silence. Tacit acquiescence in the self-delusion of another, if nothing is said or done to mislead, or silence which does not make that which is stated false, draws with it no legal liability. "Mere silence as regards a material fact which the one party is not under an *obligation* to disclose to the other, cannot be a ground for rescission, or a defence to specific performance" (u); much

the scheme." Cp. the secret agreements of a creditor with his debtor, in fraud of the other creditors, referred to in Ch. XIII, Sect. 3. For the Roman law on this subject, see App. C, Sect. 2, Sub-s. (2).

(r) As to the moral aspect of the question, compared with the judicial, see App. B, Sect. 2.

(s) De Off. III. 13: "Neque enim id est celare quicquid reticeas; sed quum quod tu scias ignorare emolumenti; tui causâ velis eos quorum intersit id scire." The latter part of this sentence, however, requires some modification to make it in strict accordance either with sound ethics or with English law. As to the Roman law on this topic, see, generally, App. C, Sect. 2, Sub-s. (2).

(t) See App. C., Sect. 3.

(u) Fry, *Specific Performance*, § 705, and Story, *Eq. Jurispr.* vol. i, §§ 204, 385, where the passage from Cicero quoted in note (s), *sup.*, is cited (though it must not be forgotten that the proposition there stated, and its application by Cicero in De Off. III, 12, 13, goes distinctly further than the actual decisions in our law would warrant); *Horsfall v. Thomas* (1862), 1 H. & C. 90, *per* BRAMWELL, B., at p. 100 (no duty to communicate defect in cannon sold, therefore no misrepresentation, the defect not having been proved to have been concealed or covered up); *Smith v. Hughes* (1871), L. R. 6 Q. B. 597, where BLACKBURN, J., at p. 607 says: "I agree that even if the vendor was aware that the purchaser thought that the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some fraud or deceit upon him, and that a mere abstinence from disabusing the purchaser of that impression is not fraud or deceit, for, whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake nor induced by the misrepresentation of the vendor"; with which compare HANNEN, J., at pp. 610, 611 ("a belief on the part of the plaintiff that the defendant was making a contract to buy the oats under the mistaken belief that they were old would not relieve the defendant from liability unless the mistaken belief was induced by some misrepresentation of the plaintiff, or concealment of a fact which it became his duty to communicate"), and COCKBURN, C.J., at p. 603 ("the question is whether . . . the passive acquiescence of the seller in the self-deception of the buyer will entitle the latter to avoid the contract. I am of opinion that it will not"); *Ex parte Burrell* (1876), 1 C. D. 537, C. A. (*per* MELLISH, L.J., at pp. 551, 552, and MELLOR, J.,

less, of course, can it constitute a cause of action for damages for *fraudulent* misrepresentation. The most familiar illustrations of this principle are the cases where a purchaser buys at the price of grazing or prairie land from an ignorant native owner land which he knows to contain valuable minerals (*x*) or through which he has privately ascertained that a railway authorized by Parliament is intended to pass; or an "old master," or a rare manuscript, from a peasant who thinks it rubbish, and sells it as such (*y*); or, conversely, where a vendor sells land with a mine under it which he knows to be nearly worked out, or where a licence is granted which, to the grantor's knowledge, has no validity or value (*z*), or where a lessor demises premises which he knows to be ruinous or unsafe (*a*), or an employer is silent as to the difficulties which the contractor will experience by reason of the nature of the soil to be excavated (*b*). In all these instances, assuming

at p. 554); *Coaks v. Boswell* (1886), 11 App. Cas. 232, H. L., *per* Lord SELBORNE, L.C., at pp. 235, 236: "inasmuch as a purchaser is (generally speaking) under no antecedent obligation to communicate to his vendor facts which may influence his own conduct or judgment when bargaining for his own interest, no deceit can be implied from his mere silence as to such facts, unless he undertakes or professes to communicate them"); and *Seddon v. North Eastern Salt Co.*, [1905] 1 Ch. 326 (*per* JOYCE, J., at pp. 334, 335).

(*x*) *Fox v. Mackreth*; *Pitt v. Mackreth* (1788), 2 Cox, 320; 2 Brown C. C. 400; 2 R. R. 55, *per* Lord THURLOW, L.C., at p. 321: "Let us put this case. Suppose A., knowing of a mine on the estate of B., and knowing at the same time that B. was ignorant of it, should treat and contract with B. for the purchase of that estate at only half its real value, can a court of equity set aside this bargain? No; but why is it impossible? Not because the one party is not aware of the unreasonable advantage taken by the other of this knowledge, but because there is no contract existing between them by which the one party is bound to disclose to the other the circumstances which had come within his knowledge. . . . It is therefore not only necessary that great advantage should be taken in such a contract, and that such an advantage should arise from a superiority of skill or information; but it is also necessary to show some obligation binding the party to make such a disclosure. Therefore, the question is, not whether the transaction be such as a man of honour would disclaim and disdain, but it must fall within some settled definition of wrong recognized by this court"; *Turner v. Harvey* (1821), Jac. 169; 23 R. R. 15, *per* Lord ELDON, L.C., at p. 178: "the purchaser may use his own knowledge, and is not bound to give the vendor information of the value of his property . . . if an estate is offered for sale and I treat for it, knowing that there is a mine under it, and the other party makes no inquiry, I am not bound to give him any information of it; he acts for himself, and exercises his own sense and knowledge"; and *Smith v. Hughes* (1871), L. R. 6 Q. B. 597, *per* COCKBURN, C.J., at pp. 603, 604: "the question is not what a man of scrupulous morality or nice honour would do under such circumstances. The case put of the purchase of an estate, in which there is a mine under the surface, but the fact is unknown to the seller, is one in which a man of tender conscience or high honour would be unwilling to take advantage of the ignorance of the seller; but there can be no doubt that the contract for the sale of the estate would be binding."

(*y*) See *Phillips v. Homfray*, No. 1 (1871), 6 Ch. App. 770, where Lord HATHERLEY, L.C., at p. 779, observes: "I apprehend it would be an error to say generally that you cannot enforce a contract in this court where the one party knows more of the value than the other does. It happens frequently in the purchase of pictures, for instance, that one party knows a great deal more of the value than the other, and yet the bargain is perfectly good."

(*z*) *Smith v. Scott* (1859), 6 C. B. (N. S.), 771, *per* WILLES, J., at p. 782, and BYLES, J., at p. 783, as to the plea of fraud.

(*a*) *Keates v. Cadogan* (*Earl of*) (1851), 10 C. B. 591; *Robbins v. Jones* (1863), 15 C. B. (N. S.) 221, *per* ERLE, C.J., at p. 223; and *Cavalier v. Pope*, [1906] A. C. 428, H. L., *per* Lord MACNAGHTEN at p. 430.

(*b*) *Ranger v. Great Western Railway Co.* (1854), 5 H. L. C. 72, *per* Lord CRANWORTH, L.C., at pp. 86, 87.

that no single word has been let fall which might mislead, and no device of any sort employed, reticence is innocuous. It is often simply a case of one man bringing his knowledge, experience, skill, or technical judgment, to bear upon the transaction, and using the weapons with which, perhaps at great cost of time labour and money, he has equipped himself for the business of life (c). No doubt, such dealings would be repugnant to a man of high honour and delicacy, who might think that in him who has a giant's strength, "'tis tyrannous To use it like a giant," that *minimum decet libere cui multum licet*, that it is not always right to exercise a right, and that knowledge, like wealth, is power, which may be abused, as well as used. Into these considerations, however, it is obvious that the law cannot enter. The only concern of jurisprudence must always be to declare under what circumstances, and in whom, a right is vested, and not to inquire whether the exercise of that right is conformable to the higher standards of refined ethics (d). But the law nevertheless so acutely appreciates the importance and value of "justifying its ways," wherever it is possible, to the moral sense of the community, that it has again and again cast a powerful searchlight over the entire *res gestæ* of any case to see whether anything is to be found in them to prevent this right of reticence from operating, or to destroy it if it has begun to do so. Thus Lord ELDON, after laying down the general principle, as already stated, is careful to add: "but a very little is sufficient to affect the application of that principle. If a word, if a single word, is dropped which tends to mislead the vendor, the principle will not be allowed to operate" (e). And to this "single word" Lord CAMPBELL, L.C., in a later case adds "a nod, or a wink, or a shake of the head from the purchaser," as facts which may make all the difference (f). Accordingly, in a case where a purchaser had concealed from the vendor of a mine the fact that he

(c) It will be observed that the expression *caveat emptor*, very commonly used as a summary statement of the proposition enunciated in the text, has been studiously avoided. In the first place, in common with all similarly abbreviated maxims, such as "the law favours the heir," "estoppels are odious," in *jure proxima causa spectatur, de minimis non curat lex*, and the like, it is too absolute to be either of any utility in practice, or scientifically correct in theory; and, in the second place, this particular phrase is more than ordinarily misleading, inasmuch as it seems to imply that it is only a purchaser who takes all risks, and has no rights against the reticent vendor, whereas, in the like absence of positive misrepresentation or breach of duty to disclose, a vendor is equally without protection against the reticent purchaser. Thirdly, the principle is not limited to silence in relation to transactions between seller and buyer, but to any transaction to which the law can give effect. Lastly, *caveat* gives no information at all. Where the one party is under no duty to disclose, it is for the other party *cavere*; but where there is such a duty, it is for the first party, and not for the other, *cavere*. So that *caveat emptor* is as utterly meaningless an expression as *caveant omnes* or *caveat unusquisque*. Every one who enters upon any business must take care of himself in respect of all matters as to which he has no right to insist that another shall take care of him. As to when he has, and when he has not these rights, the phrase in question is absolutely without guidance.

(d) See App. B, Sect. 2, *post*, and some of the passages cited in notes (u) and (x), *sup*.

(e) *Turner v. Harvey* (1821), Jac. 169; 23 R. R. 15 (at p. 178).

(f) *Walters v. Morgan* (1861), 3 De G. F. & J. 718, at pp. 723, 724.

had been secretly abstracting coal therefrom, which fact gave the vendor rights against him of a different nature from, and of a larger pecuniary value than, the mere vendor's right to the price of the coal, Lord HATHERLEY, L.C., was of opinion that there had been acts and conduct of his own which cast upon the purchaser a duty of disclosure which otherwise would not have arisen (*g*), and he likened it to the case of one "killing a man's horse and then making an offer to buy it, leaving him to suppose that it is still alive" (*h*), adding by way of further illustration, that where "a picture-dealer, employed to clean a picture, scrapes off a part of the picture to see if he can discover a mark which will tell him who is the artist, and then finds a mark showing it to be the work of a great artist; that would not be a legitimate mode of acquiring knowledge for the purpose of enabling him to buy the picture at a lower price than the owner would have sold it for had he known it to be the work of that artist" (*i*). In other words, suppression by a purchaser of facts affecting the value of the property which are not merely within his own knowledge, but the issue of his own volition and wrongful action, is equivalent to a misrepresentation. So also, where a man, in treaty with another for the purchase of a policy on the life of a third person, is in the course of the negotiations apprised of an accident to the "life," he may lawfully keep silence as to the incident if he has never made any representation at all in the first instance, but if he should thereafter insinuate in the slightest degree that the health of the "life" continues as before, his silence would become "under the circumstances equivalent to an active misrepresentation" (*k*). "Though a person may be deceived by another with the knowledge of a third person, *if that third person is not party to the deceit, and owes no legal duty or obligation to the party deceived, and does nothing but preserve silence*, however morally blameworthy . . . he cannot be held liable . . . at the instance of the party deceived," but where the party is not a mere "passive spectator," and "actively assists in the deceit," it is otherwise (*l*).

92. In their anxiety that the juridical ideal of veracity and honour should not lag behind the highest standards of ethical casuistry, the courts have from time to time committed themselves to more expansive propositions than legal principle and authority warrant. These propositions, it cannot be too emphatically insisted, are, in so far as they exceed the limits above indicated, opposed to a long chain of decisions, and cannot

(*g*) *Phillips v. Homfray*, No. 1 (1871), 6 Ch. App. 770, at pp. 778-780.

(*h*) *Ibid.* at p. 777.

(*i*) *Ibid.* at p. 780. Cp. *R. v. Boucher* (1842), 3 Q. B. 641, where a charter of incorporation was obtained from the Crown by a petition which referred, *inter alia*, to the "condition of the gaol," when in fact there was then no borough gaol in existence; and the observations of Lord HALSBURY, L.C., at p. 283 of *Aaron's Reefs, Ltd. v. Twiss*, [1896] A. C. 273, H. L., as to a person negotiating with a bank for a loan on mortgage of his house, without disclosing that he was not the owner of the house.

(*k*) *Per* WALSH, M.R. (Ireland), at p. 113 of *Thompson v. Lambert* (1868), 17 W. R. 111. See, generally, on the distinction between "intrinsic" and "extrinsic" circumstances, and the duty of disclosure of the former, Story's *Eq. Jurispr.*, vol. i. §§ 204-212.

(*l*) *Per* ROMER, J., in *Marnham v. Weaver* (1899), 80 L. T. 412.

be accepted as law, or as more than the generous and high-minded aspirations of the judges who enunciated them. Thus the dictum of BULLER, J., sitting in Chancery, that "it is *always* considered a constructive fraud when the party knows the truth, and conceals it, and such constructive fraud *always* makes the party liable," is, without the necessary qualifications, grotesquely inaccurate. Indeed, it is the very opposite of the truth; for it would be correct to say that, on the contrary, it is *never* "considered a constructive fraud, when the party knows the truth and conceals it," *without more*; unless, that is, the term "conceal" was intended by BULLER, J., to connote all those elements, already mentioned, which would make silence tantamount to a misrepresentation. But the decision which it is absolutely necessary to take notice of here, once for all, because for several generations it kept its place in the books, and was treated by the courts with a respect which it never deserved, is the decision of Lord ELLENBOROUGH, C.J., in the *nisi prius* case of *Hill v. Gray* (*m*). There the action was brought to recover £1000, the agreed price of a Claude. The defendant asked the plaintiff's agent whose property the picture was, and the agent point blank refused to answer. Thereupon the defendant chose to assume that the picture belonged to Sir Felix Agar. The plaintiff's agent did and said nothing to correct the mistake under which he knew the defendant to be labouring. But it was not on this ground that the defendant refused to pay, nor did he suggest that he had been deceived in this respect. His case was that the picture was not a genuine Claude. Lord ELLENBOROUGH, C.J., nevertheless, delivered himself of this amazing pronouncement: "I take it for granted you" (addressing the plaintiff's counsel) "will prove it is a genuine Claude, but the plaintiff ought not, by his agent, to have deceived the defendant by not removing his delusion," and he positively non-suited the plaintiff on this ground, and on this alone. A richer or more monumental collection of errors it is impossible to imagine. Apart from the fact that the defendant had never even alleged that he was induced to purchase by any implied misrepresentation as to the ownership of the picture, even if such ownership could have been material under the circumstances, or that there had been any misrepresentation at all, express or implied, on this point,—a clearer case of mere self-deception on the part of the defendant, and of the total absence of even moral obliquity on the part of the plaintiff, can hardly be conceived. The plain duty of the judge, so far from non-suited the plaintiff, was to direct the jury to find for him, the defendant not having sustained any part of the burden even of allegation, much less of proof, which rests on one who sets up (though in fact he did not set it up) an affirmative plea that he was induced to enter into the contract sued upon by an implied misrepresentation of a material fact (*n*). This extraordinary case, the date of which is 1816, was assumed by VAUGHAN and COLTMAN, JJ., in 1838, to have been correctly decided, (*o*) but JERVIS, C.J.,

(*m*) (1816), 1 Stark. 434; 18 R. R. 802.

(*n*) *Vide* Ch. XII. Sect. 2. *post*.

(*o*) In *Pilmore v. Hood* (1838), 5 Bing. N. C. 97, *per* VAUGHAN, J., at pp. 107, 108,

in 1851 (*p*), and Lord CHELMSFORD, L.C., in 1873 (*q*), obviously disapproved of it, though they did not formally overrule it. It should be noted here that even SHEE, J., in his eloquent judgment in the Exchequer Chamber in *Lee v. Jones* (*r*), based his decision on grounds which (though not of course exhibiting the errors of Lord ELLENBOROUGH to their full extent) were rather more consistent with the ethico-legal doctrines of Cicero (whom he freely quotes) and of Paley, than with the carefully limited, considered, and settled propositions of the law of England (*s*).

Sub-sect. (3). Where Several Statements, Effect of the Whole to be regarded.

93. Where it is a case of a number of statements forming one entire complex representation, the primary principle of construction is that all the statements or documents, if connected by express reference or identity of subject-matter, but not otherwise, must be considered in their interrelation and bearing upon one another, in order to ascertain whether the conjoint effect of the whole is a true or a false transcript of the facts (*t*). This rule, which is Rule 3 of Article 12 in the Code, is applied both to a series of statements comprised in one document (*u*), or to a number of documents, such as the particulars and plan of a property to be sold (*x*), or, in the case of companies, a prospectus accompanied by a covering letter (*y*), or followed by a telegram printed in the newspapers, alleged to have come from the scene of the company's operations (*z*), or in connection with other documents to which it refers (*a*). Such an examination may result either in rendering the entirety of the complex representation false, though the component statements taken by themselves may be true (*b*),

and COLTMAN, J., at p. 108. In § 212 of vol. i of the 9th edition of Story's *Eq. Jurispr.* the decision seems to have been approved by the editor who was responsible for that paragraph, though not by Dr. Story himself.

(*p*) At p. 600 of *Keates v. Cadogan* (*Earl of*), (1851), 10 C. B. 591.

(*q*) At pp. 390, 391 of *Peek v. Gurney* (1873), L. R. 6 H. L. 377.

(*r*) (1864), 17 C. B. (N. S.) 482, Exch. Ch., at p. 498.

(*s*) As to Cicero's views on the liability attaching to silence, see App. C, Sect. 1, Sect. 2, Sub-s. (2), *post*. As to Paley and the moral view generally, see App. B, Sect. 2, *post*.

(*t*) The same rule applies to the construction of alleged defamatory matter. See the author's *Code of the Law of Actionable Defamation*, Article 18, Rules 1 and 2, and the cases cited in the notes thereto, particularly *Chalmers v. Payne* (1835), 2 C. M. & R. 156, *per* Lord ABINGER, C.B., at p. 159 ("the bane and the antidote must be taken together").

(*u*) *Cargill v. Bower* (1878), 10 C. D. 502, *per* FRY, J., at p. 516; *Re Metropolitan Coal Consumers Association*, *Wainwright's case* (1890), 63 L. T. 429, C. A.; *Scott v. Snyder Dynamite Projectile Co.* (1892), 67 L. T. 104, C. A.,—see the passage cited in note (*g*) to § 82, *ante*; *Aaron's Reef's, Ltd v. Twiss*, [1896] 1 Q. B. 273, C. A., *per* Lord HALSBURY, L.C., at p. 281; and *Component Tubes Co. v. Naylor*, [1900] 2 Ir. R. 1, where amongst the questions held to have been properly left to the jury, was this: "was the prospectus as a whole misleading and calculated to deceive?" The document containing the several statements was, in each of the above cases, a prospectus.

(*x*) *Denny v. Hancock* (1870), 6 Ch. App. 1; *Re Arnold* (1880), 14 C. D. 270, C. A.

(*y*) *Dringbier v. Wood*, [1899] 1 Ch. 393.

(*z*) *Andrews v. Mockford*, [1896] 1 Q. B. 372, C. A.

(*a*) *Cargill v. Bower*, *ubi sup*.

(*b*) As in *Re Metropolitan Coal Consumers Association*, *Wainwright's case*, *sup.*,

or in rendering the entirety true, though some of the component statements, taken separately, may be false (c). Or the complex representation may be so homogeneous in its falsity, that, of necessity, the whole is as false as every constituent-part, and every part is as false as the whole (d).

94. The above general rule is, however, subject to this qualification, that if one out of the several statements or documents, not inseparably or necessarily inter-connected with the other statements or documents alleged to make up the compound representation, has a clear and definite meaning, and is clearly and definitely false, the representee is entitled to rely on this one statement by itself as a misrepresentation, and it is no answer to say that, if he had carefully examined the other statements or documents, he might have discovered something which would have led him to the truth (e). Conversely, if the representor can point to some one statement which

where two of the statements in the prospectus were (1) that a large part of the capital had been *privately taken up*, and (2) that 2000 noblemen had approved of the objects of the company, and a large number of them had *subscribed to the capital*. Each of these, standing by itself, was literally true, but it was held that their conjoint effect was that the "noblemen" had "*privately taken up*" the capital, and had "*subscribed to the capital*" in that sense, and not in the ordinary sense of sending in application forms for the shares. Cp. *Scott v. Snyder Dynamite Projectile Co.*, *ubi sup.*, and the passage from the judgment of LINDLEY, L.J., at p. 106, which is cited in note (g) to § 82, *ante*, and *Drincqbier v. Wood*, *ubi sup.*, where the prospectus stated that a site had been acquired for the company's works at Edmonton, and the letter covering the prospectus spoke of "the assets of the company" as including its "freehold land," etc. Both these statements, taken separately, were true, but BYRNE, J., held that they must be construed in the light of one another, and that, when so interpreted, they amounted to a representation that the "site" was "freehold land," which was false.

(c) *Bartlett v. Salmon* (1855), 6 De G. M. & G. 33, *per* Lord CRANWORTH, L.C., at pp. 41, 42, where a statement as to ground rent, misleading in itself, was rendered innocuous by the actual figures set out in another part of the complex representation, and thus, in Lord Abinger's phrase—see note (t), *sup.*—the antidote followed the bane. (p. *Cargill v. Bower*, *ubi sup.*, *per* FRY, J., at p. 516.

(d) *Brandling v. Plummer* (1854), 2 Dv. 427; 100 R. R. 209, where KINDERSLEY, V.C., at pp. 430, 431, whilst recognizing that it was proper to read the whole of the particulars of sale together, came to the conclusion that the effect of the whole was as misleading as that of the statement (which was admittedly false) when read by itself; *Denny v. Hancock* (1870), 6 Ch. App. 1, where the plan of the property to be sold, and the particulars of the sale, so far from correcting each other's inaccuracies, were both regarded as instruments designed to co-operate in misleading the representee, *per* JAMES, L.J., at pp. 11, 12, and MELLISH, L.J., at pp. 13, 14,—see the passage from the latter's judgment which is cited in note (t) to § 85, *ante*; and *Andrews v. Mockford*, [1896] 1 Q. B. 372, C. A., where it was held that a telegram published in the *Financial News* as to the supposed success of the company's mine was intended "to strengthen" the effect of the prospectus previously issued, and that both documents were steps in one continuous fraud, *per* Lord ESHER, M.R., at pp. 377, 378, A. L. SMITH, L.J., at p. 382, and RIGBY, L.J., at pp. 382, 383.

(e) *White v. Cuddon* (1842), 8 Cl. & Fin. 766, where the conditions under which fines were payable by the custom of a manor were distinctly misrepresented, though the actual amount of income derived was not over-stated; *Re Arnold* (1880), 14 C. D. 270, C. A., *per* BAGGERLAY, L.J., at p. 282, and BRAMWELL, L.J., at p. 284, where, the plan being false, it was in vain that the vendor urged that if the purchaser had looked at the particulars in conjunction with the plan, he must have discovered that there was a blunder somewhere; and *Redgrave v. Hurd* (1881), 20 C. D. 1, C. A., *per* JESSEL, M.R., at p. 14. See Ch. X, Sect. 2, Sub-s. (1), *post*, and some of the cases cited thereunder, where it was held that references in a prospectus to other documents which, on examination, might enable the applicant for shares to discover the falsity

presents the material facts truthfully and candidly, the representee cannot rely on the necessary imperfection and incompleteness of some other statement which does not purport to do more than refer him to the first statement, such as a marginal note, or index (*f*).

Sub-sect. (4). Questions of Law and Fact as to the Meaning of Representations with a view to determining their Falsity or Truth.

95. Where the representation is contained in a document, or its terms (if orally made) are admitted, and where it is self-contained and self-luminous (as it were), that is to say, where there are no surrounding circumstances, or *res gestæ*, of such a nature as to suggest an artificial or special meaning, or the possibility of several meanings, the question of the sense to be assigned to the representation is one of law to this extent, that the court is entitled, and bound, to pronounce whether it is capable of the meaning alleged, or of any other meaning than that alleged, or of any meaning in which it would be false, or true, as the case may be (*g*). Subject to the

of some plain misrepresentation in the prospectus itself, are of no avail to prove the affirmative plea of knowledge, if the representor did not in fact choose to make the examination.

(*f*) This was what happened in *Moore v. Explosives Co.* (1887), 56 L. J. (Q. B.), 235, C. A., where in the body of a prospectus it was stated that "the completion of the works will enable the company to increase their *present capacity for manufacture* from 400 to 1000 tons of explosives *per annum*," and to this paragraph there was affixed a marginal note in red ink—"Increase of *present manufacture*." The paragraph stated the absolute truth, but the plaintiff claimed to read it, in conjunction with the marginal note, as meaning that the company's *actual present manufacture* was 400 tons per annum, which would have been untrue. It was held, however, that the marginal note, the office of which was merely that of an index finger or clue-word to the paragraph, could not possibly have the effect of adding to, or detracting from, its meaning (*per* Lord ESHER, M.R., and FRY, L.J.). *Quære*, however, as to the soundness of this decision, having regard to the undoubted rule of construction in analogous cases of defamation, where the jury is at liberty to consider whether a heading, or marginal note, or an index-entry, does not contain defamatory matters in itself, apart from the body of the book, chapter, paragraph, or contents to which it relates. See *Buckingham v. Murray*, [1825] 2 C. & P. 46.

(*g*) *Bellairs v. Tucker* (1884), 13 Q. B. D. 562, Div. Ct., *per* DENMAN, J., at p. 575, disagreeing with the view taken by LOPES, J., at the trial: "I think it was for the judge and not for the jury to say whether, with reference to the surrounding circumstances, the statements in question were expressions of hope and belief only, or statements of existing facts." But *quære*, whether, having regard to the recognition by DENMAN, J., himself of "surrounding circumstances," it was not for the jury to determine what sense, in the *light of those circumstances*, was to be attributed to the statements in the prospectus. Having regard to subsequent decisions of the C. A. and the H. L., see cases cited in note (*l*), *inf.*, it seems clear that LOPES, J., took the only proper and safe course, and that DENMAN, J.'s, opinion was wrong, though, but for the existence of the surrounding circumstances, it may have been right. It is curious to find that, three years later, DENMAN, J., even in the absence of any surrounding circumstances, took the same course, in another prospectus case, as he had criticized LOPES, J., for taking, when there did exist such circumstances, but the C. A. (Lord ESHER, M.R., and FRY, L.J.) disagreed with him on this point, holding that the paragraph there in question was capable of only one meaning, and that he ought not to have left it to the jury to say what that meaning was, or whether a marginal note affixed to the paragraph had any and what effect in altering it: *Moore v. Explosives Co.* (1887), 56 L. J. (Q. B.) 235. So also, in *Bentley and Co., Ltd. v. Black*



above, every question as to the meaning in fact conveyed to the mind of the representee is an issue of fact; and, in the case of a suggested special or secondary sense, evidence may be admissible, or even necessary. Thus it is a question of fact what "sound timber" means in a representation describing certain timber as such, and evidence is receivable on the point (*h*); where particulars are given to a life insurance company of the health and physical history of a "life," to which is appended a reference to papers containing similar particulars on a previous application to another society, it is a question for the jury whether, by this reference, the representation was intended to convey that the health of the assured was the same as it had been at the previous date, in which case it would have been false, or merely that his health at the earlier date was as it was then described to be, in which construction it would have been true (*i*), and to this issue evidence of surrounding facts (conversations and oral statements, etc.) may be relevant (*k*); and, where prospectuses of companies are concerned, the exact meaning of paragraphs, clauses, and expressions therein, upon the ascertainment of which the whole question of falsity or truth may depend, has, in every case of reasonable doubt, always been considered a matter for the jury to determine (*l*). Similarly, the question whether the mere use of the words "Trade Mark" in advertisements of an article constituted an implied representation to the public that such a mark had been registered, was treated as one of fact, to be established (if at all) by evidence of mercantile witnesses as to the meaning which the words in question would have conveyed to their minds (*m*).

(1893), 9 T. L. R. 580, C. A., Lord ESHER, M.R., said that there the proper construction to be put upon the words of the prospectus "was for the Court."

(*h*) *Woodhouse v. Swift* (1836), 7 C. & P. 310.

(*i*) *Foster v. Mentor Life Assurance Co.* (1854), 3 E. & B. 48, *per* COLERIDGE, J., at pp. 71-74, and Lord CAMPBELL, C.J., at pp. 77-81.

(*k*) *Ibid.*, *per* Lord CAMPBELL, C.J., at pp. 78, 79.

(*l*) *Clarke v. Dickson, No. 2* (1859), 6 C. B. (N. S.) 473, where the falsity or truth of a statement in the prospectus depended on the question to whom the expression "the proprietors" was intended to apply, and COCKBURN, C.J., at pp. 469-471, said that this question had been rightly left to the jury; *Charlton v. Hay, No. 2* (1875), 32 L. T. 96, where the prospectus stated that the produce of the company's mills was 800 barrels a day, and the profits £100,000 a year, and referred to certain vouchers and documents from which those figures were taken, and COCKBURN, C.J. (somewhat charitably to the defendants), left it to the jury to say whether this meant merely that the directors had these documents in their possession, showing the above figures, and that they had no reason to doubt their genuineness—on which construction the representation was true,—or that the produce and profits in fact were as stated,—in which case it was false; and *Smith v. Chadwick* (1884), 9 App. Cas. 187, H. L., *per* Lord BLACKBURN, at p. 195.

(*m*) *Sen Sen Co. v. Britten*, [1899] 1 Ch. 692, *per* SHIRLEY, J., at p. 696: "I have no evidence before me as to the effect which the representation has had upon anybody. I have nothing before me but the bare fact that these words appear upon the packages." See also the cases cited in the notes to Ch. XIV, Sect. 1, Sub-s. (5), *post*. The canons of construction stated in this section are precisely the same as those applied to the determination of the meaning of alleged defamatory matter: see Article 16, (5), (6), and (7), of the author's *Code of the Law of Actionable Defamation*, and the cases cited in the notes thereto, particularly *Capital and Counties Bank v. Henty* (1882), 7 App. Cas. 741, H. L., *per* Lord BLACKBURN, at pp. 769-778.

CHAPTER V.

WHAT CONSTITUTES FRAUDULENT, AND INNOCENT, MISREPRESENTATION RESPECTIVELY.

96. HAVING considered what a representation is in relation to the facts which it purports to represent, it remains to investigate representations, first from the point of view of the belief and mental attitude of the representor, and, next, in their effect upon the mind and material interests of the representee. This Chapter is concerned with the former, and the next two Chapters with the latter, of these questions. The former, it is true, only becomes material in certain of the various possible proceedings for misrepresentations, and is wholly irrelevant to the others, as will be seen hereafter (*a*), whereas the topics next to be discussed, such as inducement and materiality, like all those which have preceded, are vital to every form of action or defence which is based upon misrepresentation. But, in tracing the progress of falsehood from its source to its destination, with a view of establishing how and when it becomes actionable, it seems desirable to observe the order of time, which in this case is also the logical and psychological order; and, if so, the next stage in the progress is obviously the mind of the representor.

SECT. 1. FRAUDULENT MISREPRESENTATIONS.

97. In certain cases (*b*), the party complaining of having been misled by a representation to his injury, has no remedy unless the representation was not only false, but fraudulent. Fraud, no less than falsity, is a question of fact (*c*), and the burden of establishing this fact, in every such case, is on the representee (*d*). The question, however, of what are the constituent elements of fraud, as applied to a representation, is a question of law, in the sense that it has been settled by judicial authority, which it is now proposed to examine.

(*a*) See Ch. IX, *post*.

(*b*) See Ch. X, Sect. 1, *post*.

(*c*) See generally the cases cited in the notes to this Section, and also to Ch. X, *post*.

(*d*) See Ch. X, Sect. 1, *post*.

Sub-sect. (1). Fraud as distinguished from mere Falsity.

98. It is now well established that fraud in law, and fraud in equity, are one and the same (c). It has also been laid down that juridical fraud is conterminous and co-extensive with moral fraud. Whether this be a strictly correct form of expression or not (f), one thing is clear, that the law has determined what fraud is, in its application to representations, and that there is no such thing as "imputed," "constructive," "technical," "artificial," or "legal fraud," if these terms are used for the purpose of suggesting that any court will impute fraudulent misrepresentation to a man who has not been guilty of actual fraud. If, and in so far, only as these phrases serve to indicate that the ingredients in actual fraud have been defined by the law, they are correctly employed; but, by their constant use in other and less legitimate senses, they have wrought havoc in the domain of scientific terminology, and have been the occasion of all the many heresies which flourished until finally dispelled by Lord HERSCHELL's acute and exhaustive analysis (g). From early times (h), it has been recognized that "every deceit comprehends a lie, but a deceit is more than a lie" (i). It connotes more and denotes less. There cannot be a fraudulent representation which is not false, but there can be a misrepresentation which is not fraudulent. Except in those cases where the very fact expressly or impliedly represented is the knowledge or belief or other state of mind of the representor, and where, therefore, it so happens that falsity is conterminous with fraud, and truth with innocence (k), untruth does not of itself import a dishonest mind any more than, conversely, an intention to deceive necessarily involves that the statement made was untrue in fact (l). "In an action of deceit" (said Lord HERSCHELL in the latest of the leading cases on fraudulent misrepresentation, as

(c) *Le Lièvre v. Gould*, [1893] 1 Q. B. 491, C.A., per Lord ESHER, M.R., at p. 498; cp. *Derry v. Peek* (1889), 14 App. Cas. 337, H. L.

(f) Reasons are given in App. A, Sect. 4 and Sect. 5, Sub-s. (1), *post*, for thinking the expression incorrect, and also for questioning whether the use of the term "fraud" at all has not been unnecessary, and even mischievous.

(g) In *Derry v. Peek*, *sup.* at pp. 359-380.

(h) Though no very clear distinction was drawn between mere falsity and fraud in the very early stages of our jurisprudence, as may be seen from the references given in App. A, Sect. I, Sub-s. (2), *post*, to the views of judges and practices of pleaders of those days.

(i) BULLER, J., at p. 56 of *Pasley v. Freeman* (1789), 3 Term. Rep. 51.

(k) It has been seen—see §§ 16, 33, 38, *ante*—that expressions of intention, belief, opinion, etc., constitute an implied statement of the fact that the representor has the intention, belief, or opinion which he professes to have. If, therefore, such implied statement is false, it must necessarily be fraudulent also. So also, where the representor expressly adds such qualifications as "so far as I know," "to the best of my belief," etc.: see *Milne v. Marwood* (1855), 15 C. B. 500. Illustrations of innocence, in this class of case, being exactly equivalent to truth, are: *Horsfall v. Thomas* (1862), 1 H. & C. 90, per BRAMWELL, B., at pp. 100, 101; *Bodger v. Nicholls* (1873), 28 L. T. 441, per BLACKBURN, J., at p. 445; and *Melbourne Banking Corporation v. Brougham* (1882), 7 App. Cas. 307, at pp. 319, 320, with which compare, as applied to marine insurance, the rule stated in the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 20 (5): "a representation as to matter of . . . belief is true if it be made in good faith." See also § 72, *ante*.

(l) See § 68, *ante*.

BULLER, J., had laid down, in the passage above cited from the earliest of them) "it is not enough to establish misrepresentation alone; it is conceded on all hands that something more must be proved . . . though it has been matter of controversy what additional elements are requisite" (*m*).

Sub-sect. (2). Non-belief in Truth renders Misrepresentation Fraudulent.

99. What then are the "requisite additional elements" referred to by Lord HERSCHELL? It is submitted that there is only one, viz. absence of honest belief by the representor, at the material date, that the statement made by him was true (*n*). This is the genus: all the conditions of the representor's mind which are usually enumerated as distinct genera are merely so many species of this main class, or instances, with more or less aggravating circumstances, of this single proposition. The non-belief referred to covers everything. It is, so to speak, the least common multiple, from one point of view, or the greatest common measure, from another. It is usually stated that a misrepresentation is fraudulent when the representor (1) knew it to be false, or (2) believed it to be false, or (3) did not know or believe it to be true, or (4) made it in reckless indifference as to its truth or falsity. This is as unscientific a classification as a division of the animal creation into horses, vertebrates, and animals, would be. It is obvious, as Lord HERSCHELL points out in his famous judgment (*o*), that (4) is the same thing as (3), with a needlessly added term of opprobrium (*p*); and equally obvious that (2) is an *à fortiori* case of (3), and (1) of (2), and that all four cases are comprehended in the formula that "a fraudulent misrepresentation is a misrepresentation which, when made, or (in the case of a continuing representation) when acted upon, the representor did not in

(*m*) *Per* Lord HERSCHELL at p. 359 of *Derry v. Peck* (1889), 14 App. Cas. 337, H. L.

(*n*) See App. A, Sects. 1, 2, and 3, as to the successive stages in the history of the doctrine, culminating in the present possibility of expressing it in the simple and comprehensive formula of the text. As to the "material date," *vide post*, Sub-s. (4).

(*o*) At p. 374 of *Derry v. Peck* (1889), 14 App. Cas. 337, H. L.

(*p*) In many of the cases cited under § 100, it will be noticed how frequently judges have thought it necessary to characterize the putting forth of a statement without belief in its truth as a thing done "recklessly," or with culpable "indifference" as to its truth or falsity, or "in a gambling spirit." All these *purpurei panni*, and rhetorical supplements, are entirely unnecessary, and (what is worse) they tend to mislead, as will be seen in Sect. 2, *post*, where it is shown that the heresy of assimilating negligence in belief to absence of belief is the outcome of the confusion in thought between want of care in arriving at the belief, and the making of a representation without belief, and without caring whether it is true or not,—a confusion which could never have arisen if the expressions in question had not been tacked on to the phrase "absence of belief." If in fact the representor does not honestly believe his representation to be true, it is utterly immaterial in what spirit—speculative, reckless, or deliberate—he propounds it. The mere propounding it is the fraud. But the terms in question would lead the unwary to suppose that, if the absence of belief is not characterized by the gambler's spirit, it does not indicate fraud. This delusion is encouraged by the inveterate practice of pleaders, whose tendency it is never to desert a phrase, however unnecessary or erroneous, of which they have once become enamoured.

fact honestly believe to be true" (g). And, though he had previously, in deference to current modes of expression, mentioned (1), (3), and (4) as so-called classes of fraudulent representation, this was the opinion finally expressed by Lord HERSCHELL: "to prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground" (r). In other words, it "covers the whole ground" to say that, where this "honest belief in its truth" is not to be found, the misrepresentation is fraudulent; where it is, it is innocent. The expression "honest belief" imports that there may be an actual and real belief which yet will not save the misrepresentation from being fraudulent. This happens when the belief itself is generated by a resolution to avoid all sources and means of information which would lead to suspicion,—by a wilful and sedulous abstention from, or curtailment of, investigation for the express purpose of putting the representor in a position to say that he in fact believes what he professes to believe,—by that "diligence in ignorance" (to use the felicitous expression of KNIGHT-BRUCE, V.-C.), in order not to ascertain the truth, or have any doubt thrown on what he desires, and is determined, to believe, which plays so important a part in the doctrine of constructive or imputed notice. A belief so engendered may be as much a badge of fraud as the absence of any belief at all. The qualification of "honesty" is mentioned in several of the authorities, but without any apparent meaning being attached to the term "honest," other than "actual" or "real" (s); but Lord HERSCHELL expresses his view that it has a precise and important signification, which he describes thus: "if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false" (t). A precisely similar doctrine is applied, in the analogous province of defamation, to the question of actual malice, which may be shown as much by that sort of belief in the truth of the defamatory matter which has been itself engendered by malice, as by the absence of any belief (u).

100. No authority need be cited, for the obvious proposition that knowledge or belief of falsity is fraud. This has never been doubted in modern times, and, even in the early history of our jurisprudence, such positive knowledge or belief was always regarded as at least an element in fraud, though it was then erroneously considered that other

(g) This is Article 13 of the Code.

(r) *Derry v. Peek*, *ubi sup.*, at p. 374.

(s) See, for instance, *Shrewsbury v. Blount* (1841), 2 M. & G. 475, *per* ERSKINE, J., who, at p. 507, uses the expressions "really believed in their truth," and "honestly believed the representations to be true," as if they were convertible.

(t) *Derry v. Peek*, *sup.*, at p. 376.

(u) See the observations of TINDAL, C.J., at p. 382 of *Smith v. Thomas* (1835), 2 Bing. N. C. 372 (direct malice against the plaintiff may have gone far in producing the defendant's belief"), and those of BRETT, L.J., at p. 248 of *Clark v. Molyneux* (1877), 3 Q. B. D. 237, C. A., where he speaks of a state of mind created by "wilful blindness and obstinate adherence to an opinion," as a possible indication of malice.

elements, such as intention and motive (*x*), were necessary to establish actionable deceit. But, as to absence of belief in the truth of the misrepresentation, the principle enunciated by Lord HERSCHELL, as above stated (*y*), was not by any means accepted to its full extent all at once. Beginning with the year 1778, indeed, it was held by Lord MANSFIELD, C.J., Lord KENYON, C.J., and Sir JAMES MANSFIELD, C.J., in succession, that to undertake to state as a fact that which the representor does not *know* to be true, or as to which he is ignorant (that is, does not *know*) whether it is true or not, is fraudulent (*z*); but it was not until 1843 that mere *non-belief* in the truth was definitely pronounced sufficient to make a false representation fraudulent also (*a*). From that date down to the present time this last proposition has been reasserted in different language, and applied to various representations and circumstances (*b*), though in many of the

(*x*) See Sub-s. (3), *inf.*

(*y*) *Derry v. Peek*, *sup.*, at p. 374.

(*z*) *Pawson v. Watson* (1778), Cowp. 785, *per* Lord MANSFIELD, C.J., at p. 788 ("it is equally false"—by which, as is clear from the context, he meant "fraudulent"—"to undertake to say that which he knows nothing at all of, as to say that is true which he knows is not true"); *Haycraft v. Creasy* (1801), 2 East, 92, *per* Lord KENYON, C.J., at p. 103 ("it was enough . . . that the defendant affirmed that to be true within his own knowledge which he did not know to be true"); and *Schneider v. Heath* (1813), 3 Campb. 506 (*per* Sir JAMES MANSFIELD, C.J., where a false commendation of the condition and qualities of a vessel by one who had never examined her was deemed fraudulent).

(*a*) *Taylor v. Ashton* (1843), 11 M. & W. 401, where PARKE, B., delivering the judgment of the court, laid down in clear and precise terms, at p. 415, the proposition that "it is not necessary to show that the defendants knew the fact to be untrue; if they stated a fact which was untrue" (the report has "true"—an obvious clerical error), "for a fraudulent purpose, *they at the same time not believing that fact to be true*, in that case it would be both a legal and moral fraud."

(*b*) *Evans v. Edmonds* (1853), 13 C. B. 777 (*per* MAULE, J., at p. 786: "I conceive that if a man, having no knowledge whatever on the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril, and if it be done with a view to secure some benefit to himself or to deceive a third person, he is in law guilty of a fraud, for he takes upon himself to warrant his own *belief* of the truth which he asserts"); *Higgins v. Samels* (1862), 2 J. & H. 460 (*per* PAGE-WOOD, V.C., at p. 468); *Behn v. Burness* (1863), 3 B. & S. 751, Exch. Ch. (*per* CUR. at p. 753, where the phrase "reckless ignorance whether it may be true or untrue" is for the first time introduced); *Reese River Silver Mining Co. v. Smith* (1869), L. R. 4 H. L. 64 (*per* Lord CAIRNS at pp. 79, 80: "if persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue"—explained by Lord HERSCHELL in *Derry v. Peek*, *sup.*, at pp. 370, 371, to mean "conscious of their ignorance, or having no belief, as to whether they are true or untrue"—"they must in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue"); *Arkwright v. Newbold* (1881), 17 C. D. 301, C. A. (*per* COTTON, L.J., see p. 320: "reckless disregard," etc.); *Leddell v. McDougal* (1881), 29 W. R. 403, C. A. (*per* JESSEL, M.R., at pp. 404, 405, JAMES, L.J., at p. 405, and LUSH, L.J., at p. 405); *Edgington v. Fitzmaurice* (1885), 29 C. D. 459, C. A. (*per* DENMAN, J., at pp. 465, 466, who, sitting in Chancery in the court below, had said that a statement made "in a gambling spirit, without properly inquiring into the truth or falsity of the thing, without caring sufficiently whether it is true or false, and will, or will not, mislead people . . . is, in the eye of a law, a fraudulent statement as much as if the persons making it had known it to be false"; *cp.* also pp. 472, 473: this view was approved in the C. A. by COTTON, L.J., at p. 480, and BOWEN, L.J., at pp. 481, 482); *Cann v. Wilson* (1888), 39 C. D. 39 (*per* CHITTY, J., at pp. 43, 44, as to "reckless" statements: his views on *this point* not being dissented from by the C. A. in the case which overruled the decision itself on the question of privity); *Angus v. Clifford*, [1891] 2 Ch. 449, C. A. (*per* BOWEN, L.J., who, at p. 471, describes the "indifference" in question as "the moral obliquity which consists in the wilful

authorities the element of "recklessness," "indifference," etc., above referred to, has been needlessly imported, with the object, apparently, of reconciling the juridical, with the popular, conception of dishonesty (*c*). Further than as already stated, the law has steadily refused to define a fraudulent misrepresentation. The man of guile would welcome precision and specification in any such definition; for he would assuredly at once invent some form of lie which would fall just outside the limits of any particular species or prohibited area. The courts must be as subtle in *dolus bonus* when hunting him, as he is in *dolus malus* when trying to escape from them. If the *dolosus versatur in generalibus*, so must the law. The Roman jurists, with the same wise motive, described their *dolus* in similarly wide and unrestricted terms (*d*).

Sub-sect. (3). Motive and Intention of Representor Immaterial.

101. It has resulted from the policy of the law to set no unnecessary limits to the connotation of the term "fraudulent," which should, above all others, be a *nomen generalissimum*, that, as is now at least well settled, "for the above purpose, it is immaterial whether the representor, in making the misrepresentation, had or had not any intention to deceive, defraud, or injure, the representee, or any other person, or to benefit himself or any other person, or what, if any, was his motive for making the same" (*e*). This rule has only been evolved by slow degrees. Having (quite unnecessarily) introduced the term "fraud" in connection with the doctrine of civil liability for misrepresentation, and having invested this futile phantom with the attributes and apparel of sacro-sanctitude, instead of simply declaring that a misrepresentation made without belief in its truth to a person acting thereon, and damnified thereby, is the subject of an action for damages at the suit of the latter, the courts found themselves, like Frankenstein, embarrassed by the necessity of explaining, and playing up to, the monster which they were powerless to extinguish (*f*). Consequently, as fraud involves a wicked mind, and, further, a person defrauding on the one side and a person

disregard of the importance of truth"); *Pritty v. Child* (1902), 71 L. J. (κ. β.) 512. Div. Ct. (*per* CHANNELL, J., who, see p. 514, was evidently of opinion that the water-finder's reckless statement was, and might very well have, though in fact it had not, been found fraudulent by the County Court Judge); and *J. R. Coats, Ltd. v. Crossland* (1904), 20 T. L. R. 800 (*per* SWINFEN-EADY, J., at pp. 803-806, who found "reckless" non-belief in the case of one of the directors issuing the prospectus).

(*c*) See the passages cited or referred to in the foregoing note from the several judgments in *Behn v. Burness*, *Arkwright v. Newbold*, *Edgington v. Fitzmaurice*, *Cann v. Willson*, and *Angus v. Clifford*, *sup.* As to the ethical views entertained on this question by popular, and by theological, casuistry, see App. B., Sects. 1 and 2, respectively, *post*. There is the same insistence on the element of "recklessness" and "indifference" in non-belief, as an ingredient in that actual malice which is required to defeat a plea of immunity in cases of defamation: but here, perhaps, with some reason; see the author's *Code of the Law of Actionable Defamation*, Article 38 (*iv*), and notes (*e*) and (*f*) thereto, and Article 38 (*v*) and note (*j*) thereto.

(*d*) *Vide post*, App. C, Sect. 1.

(*e*) This is Article 14 of the Code.

(*f*) See App. A, Sect. 5, Sub-s. (2), *post*.

defrauded on the other, it was thought necessary in early times to impute or invent an intention or motive on the part of the representor to do two things, viz. both injure the representee, *and* benefit himself—in other words, take money or money's worth out of the pocket of the representee, and put it into his own. The law has at last, but only by very gradual and hesitating efforts, emancipated itself from this self-created entanglement (*g*).

102. The first advance towards the sound principle which now prevails was made when the law began to recognize that an intention *either* to injure the representee, *or* to benefit the representor, was enough, and that it was not necessary to establish both intentions (*h*); the next step was taken when it was held that it was immaterial that the representor did not mean to cheat the representee (*i*); the next, when it was recognized that it is equally irrelevant that he intended to benefit, not himself, but a third person, as in the "representation of credit" cases (*k*); the next, when it

(*g*) See App. A, Sect. 2, *post*.

(*h*) *Evans v. Edmonds* (1853), 13 C. B. 777, *per* MAULE, J., at p. 786.

(*i*) *Foster v. Charles*, No. 2 (1830), 7 Bing. 105, where the jury's finding was—"we consider that there was no actual fraud on the part of the defendant and that he had no fraudulent intention, although what he has done constituted a fraud in the legal acceptance of the word"; and the Court of Common Pleas, *per* TINDAL, C.J., at p. 107, held that the absence of this fraudulent intention was immaterial, the only meaning of the jury's verdict being that they exculpated the defendant from the charge of the more "gross," "base," or "sordid" species of fraud,—an exculpation which was of no legal significance or effect,—and that the verdict had rightly been entered for the plaintiff; *Milne v. Harwood* (1855), 15 C. B. 778, where again the jury, in their natural repugnance to brand with the stigma of fraud a misrepresentation which was not fraudulent in the popular, though it was in the legal, sense, appended to their finding for the plaintiff this rider—"but we acquit the defendant of any fraudulent intention"; and again the Court of Common Pleas held, as in the last case, that the rider had no effect in law, and that the jurors had merely "thought fit to add something to make it go down more easily with the defendants," *per* MAULE, J., at p. 783; *Peek v. Gurney* (1873), L. R. 6 H. L. 377, *per* Lord CAIRNS, at pp. 409, 410: "they" (the directors) "may be absolved from any charge of a wilful design or motive to mislead or defraud the public," after which he goes on to say that this is wholly immaterial, the only question being, "was there, or was there not, a misrepresentation in fact?" by which, judging from the context, he clearly meant, "was there a *fraudulent* misrepresentation in fact?"—that is, by virtue of the mere fact of making it without belief in its truth—as explained by Lord HERSHELL at p. 371 of *Derry v. Peek* (1889), 14 App. Cas. 337, H. L.; and *Arnison v. Smith* (1888), 41 C. D. 348, C. A., *per* Lord HALSBURY, L.C., at p. 368 ("if men tell for business purposes what in plain English is called a lie, they are guilty of fraud, and to talk about their having had no intention to deceive is no more a defence than it would be a defence to a prosecution for forging a bill of exchange to say that the forger meant to pay it when it became due"), and LINDLEY, L.J., at pp. 372, 373.

(*k*) *Pasley v. Freeman* (1789), 3 Term. Rep. 51, *per* BULLER, J., at p. 58: "if A. by fraud and deceit cheat B. out of £1000, it makes no difference to B. whether A. or any other person pockets that £1000"; *Foster v. Charles*, No. 2 (1830), 7 Bing. 105, *per* TINDAL, C.J., at pp. 106, 107; and *Leddell v. McDougal* (1881), 29 W. R. 403, C. A. Similarly, it is conceived, if the misrepresentation, being otherwise fraudulent, was made with the object of injuring a person other than the representee, who was to be only the channel through which that person was to be cheated, it can make no difference to the result, whether the representee was in fact misled and injured, or not. There is no authority directly in point, but, in dealing with the analogous case of intention in publishing defamatory matter, Lord BLACKBURN, at p. 772 of *Capital and Counties Bank v. Henty* (1882), 7 App. Cas. 741, H. L., after showing that "the question is not whether the defendant intended to convey the imputation," uses the very case as an illustration, when he says that, if the tendency of the matter published

was determined that it does not matter even if the representor intended neither to injure the representee, nor to benefit himself, but to do right, or positively to benefit the representee (*l*); and the last, when it was decided that a representation made without belief in its truth, is, though made without any assignable motive or intention whatsoever, as fraudulent in contemplation of law as any lie told with the grossest and most personal obliquity of purpose imaginable; so that, for instance, an advertisement of a farm to let by a representor who had, and knew he had, no farm to let, whereby another person was induced on the faith thereof to incur expense, has been deemed a fraudulent misrepresentation, though no motive for this apparently idiotic lie was proved or even alleged (*m*), and a false statement made by way of a "practical joke" to a woman that her husband had been injured in an accident has been held equally actionable (*n*).

was defamatory, the defamer "must (at least civilly) be responsible, *though his object may have been to injure another person than the plaintiff*."

(*l*) *Foster v. Charles*, No. 2 (1830), 7 Bing. 105 (*per* TINDAL, C.J., at p. 107: "it is fraud in law if a party makes representations which he knows to be false, and injury ensues, although the motive from which the representations proceeded may not have been bad"); *Polhill v. Walter* (1832), 3 B. & Ad. 114 (*per* Lord TENTERDEN, C.J., at pp. 123-125, who there approves the contention for the plaintiff that it is "not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant, or a wicked motive of injury to the plaintiff"); *Leddell v. McDougall* (1881), 29 W. R. 403, C. A. (*per* JAMES, L.J., and LUSH, L.J., at p. 405, who, recognizing that the misrepresentation in that case may have proceeded from mere kindness to the person whose credit was commended, considered this circumstance absolutely immaterial, in accordance with the well-settled principle, that it is needless to prove that the representor intended either to deceive or injure the representee, or to benefit himself); *Smith v. Chadwick* (1884), 9 App. Cas. 187, H. L. (*per* Lord BLACKBURN at p. 201: "the defendants might honestly believe that the shares were a capital investment, and that they were doing the plaintiff a kindness by tricking him into buying them. I do not say that is proved: but if it were, they are civilly responsible as for a deceit"), with which compare what JESSEL, M.R., had said, when this case was before the C. A. (20 C. D. 27, at p. 44), "he cannot be allowed to escape merely because he had good intentions"; *Re McCallum, McCallum v. McCallum* (1901), 83 L. T. 717, C. A. (*per* KEKEWICH, J., at p. 718: "fraud in the legal sense is quite consistent with every wish and intention to do that which is right," and *per* WILLIAMS, L.J., in the C. A., at p. 725). Cp. *Denton v. Great Northern Railway Co.* (1856), 5 E. & B. 860, where it is obvious that the inaccurate statement in the company's time-table could not have been *intended* either to injure the plaintiff or to benefit themselves, and yet, as the company had no belief in its truth, but, on the contrary, knew its falsity, it was treated as fraudulent. Similarly, it is of no avail to plead that the object of deceiving the individual is the public good, which was the excuse Parnell put forward for having avowedly misled the House of Commons, or the ultimate spiritual welfare of the individual himself: "the honourable men, whose daggers have stabbed Cæsar," could not cancel their responsibility by reference to their patriotic motives: still less could they have done so, if they had betrayed him. "Pious frauds," are not exempt from the rule of law, or, where they are, this is not because of the piety of the frauds, but because *in fact* they have not resulted in damage.

(*m*) *Richardson v. Sylvester* (1873), L. R. 9 Q. B. 34, *per* BLACKBURN, J., at p. 36.

(*n*) *Wilkinson v. Downton*, [1897] 2 Q. B. 57, *per* WRIGHT, J., at p. 58. "They do but jest,—poison in jest: no offence i' the world," is a plea that cannot be made for these acts of misrepresentation, any more than it can for similar acts of defamation. "As a madman who casteth firebrands, arrows, and death, So is the man that deceiveth his neighbour, and saith, Am not I in sport?" (Prov. xxvi. 18, 19). The "jest" and "sport" do not make the deceit less a deceit. The motive may be mere caprice, devilry, or the mischievous "love of roguery" on the part of "an entire stranger," which is referred to by BRAMWELL, L.J., at p. 243 of *Weir v. Bell* (1878), 3 Ex. D. 238, C. A. Or it may be some unintelligible malignity of the kind which so perplexed "him that was Othello," and moved his piteous request to those who

The net result is the absolute rule that, as Lord HERSCHELL expresses it, "if fraud be proved, the motive of the person guilty of it is immaterial" (o). The same proposition is expressed in a more cumbrous and circuitous form when it is said that, though it is necessary to prove an intention, such intention is at once and peremptorily presumed, as a conclusion of law, from the mere act of making a misrepresentation (p), just as, in actions of defamation, the unnecessary practice of pleading that malice in law actuated the publication of the defamatory matter is defended on the similar theory that malice must be shown, but is instantly presumed in law from the fact of publication *per se* (q).

Sub-sect. (4). When the Non-belief must be shown to have existed.

103. In ordinary cases—that is, when there is either no appreciable interval of time between the making of the misrepresentation and the representee's alteration of position on the faith of it, or where no change in the situation takes place during such interval—it may be said that to establish fraud it is necessary and sufficient to prove that the representor,

stood around: "Will you, I pray, demand that demi-devil Why he hath thus ensnared my soul and body?" The absence of any human purpose or motive, except the indiscriminate spite of one who felt himself a misfit with the universe ("Demand me nothing," says Iago himself, "what you know, you know: From this time forth I never will speak word") would be as ineffectual to deprive the "demi-devil's" falsehoods to Othello of their fraudulent character, as they would be to render them non-defamatory of Desdemona and Cassio. The "jest" class of case in defamation, and generally the rule as to the irrelevancy of the representor's intention, or absence of intention, are fully discussed in note (e) to Article 17 (4) of the writer's *Code of the Law of Actionable Defamation*.

(o) *Derry v. Peek* (1889), 14 App. Cas. 337, H. L., at p. 374. Cp. *Stone v. Compton* (1838), 5 Bing. (N. C.) 142. at pp. 155, 156; *Crawshay v. Thompson* (1842), 4 M. & G. 357, *per* MAULE, J., at p. 382; and *Hendriks v. Montague* (1881), 50 L. J. (CH.) 456, C. A., *per* BRETT, L.J., at pp. 458, 459.

(p) *Foster v. Charles*, No. 1 (1830), 6 Bing. 396, *per* TINDAL, C.J., at p. 403 (not "material what the motive was." *The law will infer an improper motive, if what the defendant says is false with his own knowledge, and is the occasion of damage to the plaintiff*); *Corbett v. Brown* (1831), 8 Bing. 33, *per* ALDERSON, J., at p. 37 ("the question is whether, from the statements being false within the defendant's knowledge, the court must not infer fraud"); *Crawshay v. Thompson*, *sup.*, *per* MAULE, J., at p. 381 (from a proved "natural tendency" to deceive, "*the intention to defraud will follow as a matter of law, as well as of common sense*"), and at p. 382 ("if a wrong be done by a false representation of a party who knows such representation to be false, the law will infer an intention to injure"); *Smith v. Chadwick* (1884), 9 App. Cas. 187, H. L., *per* Lord SELBORNE, L.C., at p. 190 ("the intention which the law justly imputes to every man to produce those consequences which are the natural results of his acts" is stated to be one of the tests by which "actual fraud" must be "judged"); *Coaks v. Boswell* (1886), 11 App. Cas. 232, H. L., where Lord SELBORNE, L.C., at p. 236, again insists, in relation to the making of "a communication which would be necessarily, or naturally and probably, misleading," that "if it is a fair conclusion that he did this intentionally, and with a view to mislead in any material point, that is fraud. *A man is presumed to intend the necessary or natural consequences of his own words and acts, and the evidentiæ rei would therefore be sufficient without other proof of intention*"; *Arrison v. Smith* (1888), 41 C. D. 348, C. A., *per* LINDLEY, L.J., at p. 372; and *Wilkinson v. Downton*, [1897] 2 Q. B. 57, *per* WRIGHT, J., at p. 59 ("it is difficult to imagine that such a statement . . . could fail to produce grave effect under the circumstances upon any but an exceptionally indifferent person, and therefore an intention to produce such an effect must be imputed.")

(q) This is the subject of App. II of the author's *Code of the Law of Actionable Defamation*.

when making the misrepresentation, did not believe in its truth. But where there is such an interval—that is, in the case of a continuing representation (*r*)—and there is some alteration of the circumstances in that interval, the time at which the representor's state of mind becomes material to the question of fraud or innocence is, it is conceived, the later, and not the earlier, of the above two dates.

104. The change in the situation may assume either of these forms. It may come to the knowledge of the representor, during the interval, that his original statement was false, when made, though he then believed it to be true. Or, though the representation was, when made, not only believed to be, but in fact, true, it may become, by reason of events supervening in the course of the interval, in substantial discrepancy with the facts existing at the date of the representee's alteration of position, and, therefore, as has already been seen (*s*), false in fact. Both types of case are mentioned in a frequently quoted passage from a judgment of FRY, J., and in both he expresses the view that there rests on the one party "an obligation to disclose to the other the change of circumstances" (*t*). But, in the case before him, which was one of rescission, it was not necessary for FRY, J., to, nor did he, expressly decide whether the failure to discharge such obligation would render the misrepresentation fraudulent when the change of circumstances, to the knowledge of the representor, takes place, and thenceforth until acted upon by the representee (*u*). This is the question which it now becomes necessary to consider.

105. As to the former class of case, where the representor discovers, before his misrepresentation is acted upon, that it was false when made, and does not immediately correct it in the amplest and clearest language (*x*),

(*r*) Defined in Article 9 of the Code.

(*s*) *Vide* Ch. IV, Sect. 3, *ante*.

(*t*) *Davies v. London and Provincial Marine Insurance Co.* (1878), 8 C. D. 469, at p. 475: "Again, in ordinary contracts,"—he had just been dealing with the duty of disclosure in relations and contracts *uberrimæ fidei*—"the duty may arise from circumstances which occur during the negotiations. Thus, for instance, if one of the negotiating parties has made a statement which is false in fact, but which he believes to be true, and which is material to the contract, and during the course of the negotiations he discovers the falsity of that statement, he is under an obligation to correct his erroneous statement; although, if he had said nothing, he very likely might have been entitled to hold his tongue throughout. So, again, if a statement has been made which was true at the time, but which in the course of the negotiations becomes untrue, then the person who knows that it has become untrue is under an obligation to disclose to the other the change of circumstances."

(*u*) In this case one of the parties had (impliedly at least) represented to the other at an interview that a third person was liable to a criminal prosecution. At a subsequent interview, though in the mean time facts had occurred (such as the advice of counsel) showing that the success of such proceedings was highly doubtful, these intervening facts, of which he party was aware, were not disclosed, and, on the faith of the original and uncorrected representation, the other party entered into a certain contract, which FRY, J., accordingly ordered to be rescinded. It was not a case of damages, and therefore the question of fraudulent representation which would be relevant to such a case alone (see Ch. X) did not strictly arise.

(*x*) *Arnison v. Smith* (1888), 41 C. D. 358, C. A., *per* Lord HALSBURY, L.C., at p. 370, COTTON, L.J., at pp. 371, 372, and LINDLEY, L.J., at p. 373 (a case in which the directors, on ascertaining the falsity of the prospectus, sent out an ambiguous circular so framed as "to avoid bringing to the mind of the plaintiff the real facts of the case,

there has never been any question. It is obvious that if, when the representee alters his position, the representor knows that his representation was untrue when made, he cannot displace the allegation of fraud by saying that he originally believed it to be true. Since at least 1848, this has never been doubted in any authority, either at common law (*y*), or in equity (*z*). The rule has been expressed in unambiguous and emphatic terms by Lord BLACKBURN: "when a statement or representation has been made in the *bonâ fide* belief that it is true, and the party who has made it afterwards comes to find out that it is untrue, and discovers what he should have said, he can no longer honestly keep up that silence on the subject after that has come to his knowledge. . . . *That would be fraud*" (*a*).

106. On principle, and in accordance with the general current of authority, it would seem equally clear that a misrepresentation becomes fraudulent in the second of the two classes of case abovementioned, viz. where the representor fails to reveal to the representee the occurrence of supervening events which have come to his notice in the interval, in virtue of which the statement which was, when made, in substantial accordance with the material facts then existing, becomes in substantial disaccord with the material facts existing at the time when the representee alters his position on the faith of the representation. For if, as has been shown (*b*), it is the characteristic of a continuing representation that it is, in contemplation of law, repeated at each successive moment from the *terminusa quo*, when it was put forth as an inducement, to the *terminus ad quem* when the inducement operates and materializes, for the purpose of determining whether it is false or true at the latter date, it surely follows that the mental state of the representor must be carried along with the representation in its passage between the two termini, for the further purpose of determining whether, at such latter date, it is also fraudulent or not. It is clear that the representation under such circumstances becomes false when acted upon, so as to entitle the representee to avoid the transaction. On what possible theory can it be supposed that it does not become fraudulent also, for the purpose of entitling the representee to damages? If the representor is to be regarded as saying at the last moment of the interval, "what I originally stated is in accordance with the facts *now* existing," why is he not to be also responsible in damages, as for a fraudulent, and

whilst stating enough to enable the defendant to say that the plaintiffs were informed of those facts."

(*y*) *Jarrett v. Kennedy* (1848), 6 C. B. 319, *per* WILDE, C.J., at p. 323 (discovery by directors before allotment, that all the statements in the prospectus were false when made, was not revealed to applicants, and plaintiff obtained damages accordingly as for a fraudulent suppression and misrepresentation).

(*z*) *Reynell v. Sprye*; *Sprye v. Reynell* (1882), 1 De G. M. & G. 660, *per* Lord CRANWORTH, L.J., at p. 709 ("this, from the date of the discovery"—sc. of the fact that the plaintiff's interests under a will were much larger than the defendant had originally represented or supposed—"becomes, in the contemplation of this court, a fraudulent misrepresentation, even though it was not so originally"); and *Arnison v. Smith*, *ubi sup.*

(*a*) *Brownlie v. Campbell* (1880), 5 App. Cas. 925, H. L., at p. 950.

(*b*) *Vide ante*, Ch. IV, Sect. 3.

not merely false, representation, if (as, *ex hypothesi*, is the case) he not only does not believe in the truth of that which he so asserts, but knows or believes the contrary? It would not have been thought necessary to labour this point, were it not that a high authority, JAMES, L.J., has (without, however, giving any reasons) expressed a distinctly contrary view to that now put forward (c). It is submitted that the *dictum* in question—for it is nothing more—is opposed to sound reason, and also to the main current of authority, both at common law (d), and in equity (e); and that the very class of case now under consideration clearly falls within the comprehensive statement by Lord BLACKBURN which immediately follows the passage (relating to representations subsequently discovered to have been false *when made*) which is cited above (f). This statement runs as follows: “where there is a duty and an obligation to

(c) At p. 329 of *Arkwright v. Newbold* (1881), 17 C. D. 301, C. A., where, after delivering his judgment and hearing those of COTTON and LUSH, LL.JJ., JAMES, L.J., supplemented his own by stating: “I think it right to add that I entirely agree with what Lord Justice COTTON has said, that we cannot accede to the suggestion made by counsel for the plaintiffs, that the persons issuing a prospectus are liable to an action of deceit” (which they could not be except in the case of a *fraudulent* misrepresentation—see Ch. X), “because they do not mention a fact coming to their knowledge before the allotment of shares, which falsifies a statement in the prospectus.” But COTTON, L.J., who is thus vouched as a party to this *positive* expression of opinion, had not in fact gone so far. All he had said (at p. 325), after mentioning the question “how far the plaintiff could have obtained any relief if the statement in the prospectus had, to the knowledge of the directors, become untrue before the contract had been completed,” was this:—“on this point I give no opinion, but I must not be considered as acceding to the view that the coming into existence of a fact which would have made a statement in the prospectus untrue, if it had existed at the time of the issuing of the prospectus, would, in an action of deceit, entitle the plaintiff to relief.” That is to say, he neither accedes, nor differs, but reserves his opinion. This is a very different thing from expressing a final and definite adverse view. LUSH, L.J., did not mention the point at all. So that the doctrine rests entirely on the statement of JAMES, L.J., not supported by any reasoning, and quite unnecessary to the decision, which was in favour of the defendants on other grounds.

(d) See *Adamson v. Jervis* (1827), 4 Bing. 66, which neatly raises the point: for the action there was for damages for *fraudulent* misrepresentation of authority from the owner to sell. This was true when the representor made the statement, but at the time of the auction sale it had ceased to be so, he no longer having that authority. BEST, C.J., at p. 74, delivering the judgment of the Court of Common Pleas, said: “for this injury the plaintiff is entitled to compensation, *whether the affirmation was false or true at the time it was made*. If the defendant had authority to sell at the time he employed the plaintiff, but ceased to have that authority at the time of the sale, he should have informed the plaintiff of this change in his situation.” So, also, in *Denton v. Great Northern Railway Co.* (1856), 5 E. & B. 860, it was held that the company’s announcement in their time-table that a certain train ran at a certain time, which was true when first made, became subsequently fraudulent, when the train was taken off, as against any one, who, like the plaintiff, acted on the faith of the uncorrected time-table as a continuing representation of the truth: *per* Lord CAMPBELL, C.J., at pp. 866, 867, and WIGHTMAN, J., at p. 867.

(e) *Traill v. Baring* (1864), 4 De G. J. & S. 318, where there was an implied representation by one insurance company to another that they had the intention of taking a third of the risk, and procuring another company to take another third, if the representees would take the remaining third, and it was held by KNIGHT-BRUCE and TURNER, LL.JJ., that, assuming the representors *bonâ fide* had this intention when making the representation, it was their duty to inform the representees of their subsequent change of mind before the latter acted upon it as originally made, and that their failure to do so constituted, “in the eyes of this court,” a fraudulent misrepresentation.

(f) § 105, *sup.*

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speak, and a man in breach of that duty or obligation holds his tongue and does not speak, and does not say the thing he was bound to say, if that was done with the intention of inducing the other party to act upon the belief that the reason why he did not speak was because he had nothing to say, I should be inclined myself to hold that that was fraud also" (*g*),—by which last words it is evident that he was intending to distinguish this species of case, or a class which includes it, from, and to add it to, the species which he had just been considering, and which answers to the first of the two types of continuing misrepresentation above indicated.

SECT. 2. INNOCENT MISREPRESENTATIONS.

107. Fraudulent and innocent misrepresentations constitute two opposite and mutually exclusive categories, just as much as true and false representations. For purposes of legal proceedings, a representation can no more be compounded of dishonesty and honesty, than it can be of untruth and truth. It follows that a misrepresentation is innocent when at the material date the representor did in fact honestly believe it to be true (*h*). What "honest belief" is, has already been considered (*i*). It remains to examine the nature of "belief in fact."

Sub-sect. (1). Honest Actual Belief constitutes Innocence in Misrepresentation.

108. Actual belief in the truth of the misrepresentation is the test of its innocence. Less than this, as we have seen, will not suffice; but, on the other hand, more is not required. This proposition was clearly laid down by the Exchequer Chamber in 1844 (*k*), but, owing to certain dubious dicta which had in the mean time made fitful appearances in the Court of Chancery, and afterwards in the Chancery Division, it had to be restated by the House of Lords in 1889 (*l*), as it was, beyond all cavil, question, or dispute (*m*), in the luminous and penetrating exposition of Lord HERSCHELL,

(*g*) *Brownlie v. Campbell* (1880), 5 App. Cas. 925, H. L. at p. 950.

(*h*) This is Article 15 of the Code.

(*i*) *Vide ante*, § 99, and notes (*t*) and (*u*) thereto.

(*k*) *Collins v. Evans* (1844), 5 Q. B. 820, Exch. Ch. (*per* TINDAL, C.J., delivering the judgment of the Exchequer Chamber, at pp. 827, 830). It was held that "a statement or representation, which is false in fact, but not known to be so by the party making it, but on the contrary made honestly, and in the full belief that it is true," is not the subject of an action for damages—in other words, is not deemed fraudulent.

(*l*) *Derry v. Peek* (1889), 14 App. Cas. 337, H. L.

(*m*) Though, at p. 503 of *Le Lièvre v. Gould*, [1893] 1 Q. B. 491, BOWEN, L.J., complains of "the reappearance to some extent . . . of the old misapprehension of the effect of the decision in *Derry v. Peek*, for," he adds, "I have myself stated, until I am almost tired of doing so . . . exactly what *Derry v. Peek* did decide and did not decide." It certainly is amazing that Lord HERSCHELL's judgment should have been incompletely apprehended even for the short period of four years or so to which BOWEN, L.J., refers; but it may safely be said that the principles laid down in that judgment are, now at least, beyond dispute, after the supplementary disquisitions (needless though one would have antecedently supposed them to be) delivered by BOWEN, L.J., in *Angus v. Clifford*, [1891] 2 Ch. 449, C. A., and in *Low v. Bouverie*, [1891] 3 Ch. 82, C. A., as well as in the *Le Lièvre v. Gould*, *sup.*

whose judgment is, and always will be, the *locus classicus* on this subject (*n*). Belief, not knowledge, is the criterion. It is no more necessary to constitute innocence that the representor should know the stated fact to be true, than it is necessary to constitute fraud that he should know it to be false. "Justification by faith" is a doctrine which applies to the law of misrepresentation, as much as to the Articles of Religion, and faith is not knowledge for the former purpose, any more than for the latter (*o*), nor need it be rational, or based on sound premises; it may, indeed, be violently opposed to reason and good sense (*p*), but it must be *good* faith, that is to say, it must be sincere. If, under these conditions, belief in fact accompanied the misrepresentation, no mere intellectual shortcomings will avail to destroy its character of innocence, any more than the like defects, in the law of defamation, will render "comment" unfair, or deprive an honest defamer of the immunity which attaches to any other protected publication (*q*).

Sub-sect. (2). Negligence, Absence of Reasonable Grounds, etc., consistent with Innocence.

109. Care, skill, and competence being irrelevant to the question of whether a misrepresentation is innocent or fraudulent, it follows that any statement which fulfils the one condition of innocence above stated, is not rendered fraudulent "by the mere fact that the belief was unreasonable, or was based upon inadequate materials, information, or inquiry, or arose from negligence, forgetfulness, inadvertence, or incompetence (*r*). It is the existence and genuineness of the representor's belief on which alone rests his *moral* qualification to be free of any imputation of fraud. By what *mental* processes he arrived at the conclusion, or whether his mind was sluggish or active, suspicious or credulous, rational or irrational, prone to investigate or ready to take everything for granted, are questions which, *per se*, have no relevance. This proposition has now been clearly and

(*n*) *Derry v. Peek, sup.*, at pp. 359-380. At pp. 359, 360, Lord HERSHELL distinguishes proceedings for rescission, and "making good," and also cases of estoppel, in none of which is the question of fraud or innocence relevant. At pp. 360-363, he criticizes the judgments of the Lords Justices, which the House was reversing. At pp. 363-374, he makes a "close and critical examination of the earlier authorities," and at pp. 374-376 lays down the principles which he deduces from them, when purged of their occasional errors.

(*o*) "Faith is not knowledge, no more than three is four, but eminently contained in it; so that he that knows believes, and something more; but he that believes many times does not know—nay, if he doth barely and merely believe, he doth never know."—Chillingworth's *Religion of Protestants*, p. 412. Cp. the patristic dictum: *apparentia non habent fidem, sed agnitionem*.

(*p*) On the *credo quia incredibile* principle of Tertullian.

(*q*) The subject is discussed in note (*g*) to Article 38 (iv), and note (*k*) to Article 38 (v), of the author's *Actionable Defamation*. See particularly the two cases there cited of *Clark v. Molyneux* (1877), 3 Q. B. D. 237, C. A., and *McQuire v. Western Morning News*, [1903] 2 K. B. 100, C. A.

(*r*) This is Article 16 of the Code. Cp. the definition of "good faith" in s. 90 of the Bills of Exchange Act, 1882, and s. 62 (2) of the Sale of Goods Act, 1893: "A thing is deemed to be done in good faith, when it is in fact done honestly, whether it be done negligently or not."

finally established by the decision of the House of Lords above referred to, but, before that decision, there had been, as Lord HERSCHELL points out in reviewing the authorities (s), an occasional judicial use of unguarded expressions which, particularly when divorced from their context, might not unnaturally encourage the heresy that certain things, if otherwise grossly culpable, might, though not amounting to fraud, be treated as if they did, merely because their consequences are just as serious (t).

110. Thus, negligence, however gross, is not fraud. Indeed, it may be said to be its direct *antitheton*. This is now well established (u); but it has often been said that negligence may be so gross as to amount to evidence of fraud (x). In its literal sense, this proposition is of course quite inaccurate. Negligence no more indicates fraud, than it constitutes it. Black cannot be evidence of white, any more than it is white. But the *alleged* white may be of so exceedingly dingy a hue that any person called upon to decide whether it is black or white, there being no middle colour possible, may be justified in saying that the thing described as white is in fact black. So on a plea of actual, though negligent belief, the tribunal which has to decide as to the existence and reality of the belief may be forced to the conclusion that the suggested negligence, if it were a case of negligence, would be so outrageous and abnormal that the theory of want of care must be rejected in favour of the alternative hypothesis of no belief at all. As an elliptical mode of expressing the above judicial attitude, the phrase—"gross negligence may amount to evidence of fraud,"—can be accepted, but in no other sense, and to no further extent. The proper amplification of this misleading brachylogy is to be found in judgments of Lord CRANWORTH (y), and BOWEN, L.J. (z); but even in the expositions of these accurate jurists the unfortunate term "evidence" is used. The only

(s) 14 App. Cas. 337, H. L., *sup.*, at pp. 363–374.

(t) As to the history of the fluctuating meanings of the term "fraud," *vide post*, App. A.

(u) *Evans v. Bicknell* (1801), 6 Ves. 174 (*per* Lord ELDON, L.C., at pp. 188, 191, 192); *Taylor v. Ashton* (1843), 11 M. & W. 401 (*per* PARKE, B., at p. 415: "it is insisted that even that," *sc.* gross negligence, "accompanied by a damage to the plaintiff in consequence of that gross negligence, would be sufficient to give a right of action"—*sc.* for damages. "From this proposition we entirely dissent"); *Dickson v. Reuter's Telegram Co.* (1877), 3 C. P. D. 1, C. A. (*per* BRAMWELL, L.J., at p. 6: "it is never laid down that the exemption from liability for an innocent misrepresentation is taken away by carelessness"); *Derry v. Peek* (1889), 14 App. Cas. 337, H. L. (*per* Lord HERSCHELL at p. 361); *Angus v. Clifford*, [1891] 2 Ch. 449, C. A. (*per* LINDLEY, L.J., at pp. 462–468); *Thiodon v. Tindall* (1891), 65 L. T. 343, Div. Ct. (*per* DENMAN and WILLS, J.J.); and *Le Lievre v. Gould*, [1893] 1 Q. B. 491 (*per* BOWEN, L.J., at p. 501). Similarly, negligence is not malice in defamation: See *Pittard v. Oliver*, [1891] 1 Q. B. 474, 476, C. A.

(x) For instance, by Lord ELDON, L.C., in *Evans v. Bicknell*, *ubi sup.*

(y) At p. 168 of *Western Bank of Scotland v. Addie* (1867), L. R. 1 H. L. (Sc.) 145: "if a little more care and caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to show that they really did not believe in the truth of what they stated, and so that they were guilty of fraud."

(z) *Le Lievre v. Gould*, *sup.*, at p. 500: "if the case had been tried with a jury the judge would have pointed out to them that gross negligence might amount to evidence of fraud, if it was so gross as to be incompatible with the idea of honesty, but that even gross negligence in the absence of dishonesty did not of itself amount to fraud."

statement of the principle (it is believed) which avoids this terminological pitfall, and is characterized by both literal and substantial accuracy and completeness, is that of FRY, J., in a case which involved the question of what degree of wilful avoidance of the truth amounts to constructive notice. "It has been said," he there observes, "that there may be negligence which amounts to fraud. That language has always seemed to me not strictly accurate. Fraud imports design and purpose. Negligence imports that you are acting carelessly, and without that design. But what is meant is this—that conduct which might be negligent, or might be attributable to negligence, is really attributable to a design not to know more" (a). It is partly owing to the above ambiguity of expression, and partly to the confusion between intellectual carelessness in forming an opinion, and the moral carelessness involved in putting forward a statement without any belief at all, one way or the other (b), that the notion ever gained ground that an innocent misrepresentation can be rendered fraudulent by mere proof of negligence.

111. In like manner, and for the same reasons, irrational or ill-founded belief is not the same thing as the absence of belief, nor can it be said to be indicative thereof, except in some such elliptical form of words as has been used in reference to negligence. A representor may have acted on inquiry and materials which would not have satisfied a person of normal intelligence, much less a trained judge of evidence; but this goes for nothing if the belief—the individual being what he was—really and truly existed. Belief is none the less belief because it is irrational. Innocence is not negatived by proof of the representor's stupidity, but only by proof of his

(a) At p. 706 of *Kettlewell v. Watson* (1882), 21 C. D. 685.

(b) Lord HERSCHELL, at p. 361 of *Derry v. Peek* (1889), 14 App. Cas. 337, H. L., in the course of his criticism of the views expressed in the C. A. by COTTON, L.J., says: "to make a statement careless whether it be true or false, and therefore without any real belief in its truth, appears to me to be an essentially different thing from making, through want of care, a false statement, which is nevertheless honestly believed to be true. And it is surely conceivable that a man may believe that what he states is the fact, though he has been so wanting in care that the court may think that there were no sufficient grounds to warrant his belief." So also BOWEN, L.J., at p. 501 of *Le Lièvre v. Gould*, *sup.*, observes: "there seems to have been some sort of an idea there, when a jury was asked the . . . question, whether the man had made the representation not knowing and not caring whether his statement was true or false, the expression 'not caring' had something to do with his not taking care"—(a very natural idea, it may be added, the naturalness of which illustrates forcibly the harm done by the needless introduction of rhetorical phrases as fringe and supplement to the simple "non-belief" which is adequate to all the requirements of the rule)—"but that expression did not mean not taking care to find out whether the statement was true or false; it meant not caring in the man's own heart and conscience whether it was true or false,—and that would be wicked indifference and recklessness." A third reason, or historical explanation, of the confusion between the two ideas, is given by the Lord Justice, at p. 500 of the same case, viz. "the fact that equity judges had to decide questions of law and fact together. An equity judge, when he had to deal with a question of fraud, discussed his reasons for coming to the conclusion that there had been fraud, and it very often happened that an equity judge decided that there was fraud in a case in which gross negligence had been proved. . . . Cases of gross negligence, in which the Chancery judges decided that there had been fraud, were piled up one upon another, until at last a notion came to be entertained that it was sufficient to prove gross negligence in order to establish fraud. That is not so. In all those cases fraud and dishonesty were the proper *ratio decidendi*."

bad faith. The notion that absence of reasonable grounds for a belief which actually existed can convert innocence into fraud, or into something equivalent thereto in contemplation of law, though apparently underlying certain dicta in the earlier cases (c), was never expressed in plain terms until 1867 by Lord CHELMSFORD, L.C. (d), and then was promptly disavowed and dissented from by Lord CRANWORTH (e). These, moreover, were individual opinions: there was no actual decision of any court to the above effect until that of the Court of Appeal in *Peek v. Derry* (f), which was overruled by the House of Lords, *sub nom. Derry v. Peek* (g). Here, however, as in the case of negligence, the *alleged* unreasonableness of any belief may be so glaring that a jury would be justified in inferring that the belief could never really have existed, and that the supposed believer was not so irrational, incompetent, or foolish, as, for his own purposes, he may profess to be when an attempt is made to saddle him with responsibility for the consequences of his misrepresentation (h).

112. A man may believe in the truth—that is, the complete truth—of his representation, by reason of his not remembering a qualifying circumstance which at one time he had known. This forgetfulness, again, does not,

(c) For instance, the expressions used by MAULE, J., at p. 507, of *Shrewsbury v. Blount* (1841), 2 M. & G. 475: “it would be an answer to the action that he had good reason to believe the representations which he had made,” and again, “belief reasonably well grounded,” and “well founded belief.”

(d) At p. 162 of *Western Bank of Scotland v. Addie* (1867), L. R. 1. H. L. (Sc.) 145: “if an untrue statement is made founded upon a belief which is destitute of all reasonable grounds, or which the least inquiry would immediately correct, I do not see that it is not fairly and correctly characterized as misrepresentation and deceit.”

(e) At p. 168 of the case last cited: “if persons . . . make statements . . . which they *bonâ fide* believe to be true, I cannot think they can be guilty of fraud because other persons think, or the court thinks, or your Lordships think, that there was no sufficient ground to warrant the opinion which they had formed.”

(f) (1887), 37 C. D. 541, C.A.

(g) (1889), 14 App. Cas. 337, H.L., acted upon and applied immediately afterwards by the C. A. in *Glazier v. Rolls* (1889), 42 C. D. 436, C. A. As regards prospectuses of companies, the law has been altered by statute: *vide* Ch. XIII, Sect. 1, *post*.

(h) See the observations of Lord HERSCHELL at p. 369 of *Derry v. Peek* (1889), 14 App. Cas. 337, H. L.: “I think there is here some confusion between that which is evidence of fraud, and that which constitutes it. A consideration of the grounds of belief is no doubt an important aid in ascertaining whether the belief was really entertained. A man’s mere assertion that he believed the statement he made to be true is not accepted as conclusive proof that he did so. There may be such an absence of reasonable ground for his belief as, in spite of his assertion, to carry conviction to the mind that he had not really the belief which he alleges.” Again, at pp. 375, 376, Lord HERSCHELL says: “I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the court that it was not really entertained, and that the representation was a fraudulent one.” So, at p. 380: “the statements of witnesses are by no means to be accepted blindfold. The probabilities must be considered. Whenever it is necessary to arrive at a conclusion as to the state of mind of another person, and to determine whether his belief under given circumstances was such as he alleges, we can only do so by applying the standard of conduct which our own experience of the ways of men has enabled us to form; by asking ourselves whether a reasonable man would be likely under the circumstances so to believe.” It will be noticed that both Lord CRANWORTH and Lord HERSCHELL, though the context puts their meaning beyond doubt, use the unfortunate expression “evidence” which, but for that context, would, it is submitted, tend to mislead. See § 110, *ante*, as to the use of the term in connection with negligence.

per se, negative innocence. Once more, the only question is—had he really and truly forgotten the circumstance? In an action for *fraudulent* misrepresentation, he cannot be punished for a bad memory, any more than in the other cases discussed above he can be punished for want of diligence in inquiry, or soundness in judgment (*i*). Of course in any proceeding in which it is enough to establish an innocent misrepresentation, the mere circumstance that the omitted fact was not present to the mind of the representor at the time does not excuse him if the omission was such as to render his statement false (*k*). Nor, again, if a man chooses to state a thing as the absolute fact, and therefore, impliedly, as a fact not contradicted or qualified by any other fact which has ever been within his own knowledge, can he successfully plead that his representation, if false, was not fraudulent also, because, on that hypothesis, he did not believe in the truth of that which he was impliedly asserting (*l*).

(*i*) *Bain v. Fothergill* (1874), L. R. 7 H. L. 158 (*per* Lord HATHERLEY, at p. 212); *Mathias v. Yetts* (1882), 46 L. T. 497, C. A. (*per* LINDLEY, L.J., at p. 506); and *Low v. Bouverie*, [1891] 3 Ch. 82, C. A. (*per* LINDLEY, L.J., at p. 101, and BOWEN, L.J., at p. 106). In the last case, it was held that, of the two authorities which would appear to lay down a different doctrine, *Burrowes v. Lock* (1805), 10 Ves. 470 (*per* GRANT, M.R.), and *Slim v. Croucher* (1860), 1 De G. F. & J. 518, the former can only be supported on the ground of estoppel, where of course no fraud need be shown, and the latter on no ground. The same principle is applied to actions for money had and received, on the ground of "mistake": see *Kelly v. Solari* (1841), 9 M. & W. 54.

(*k*) See the cases cited in the last note, particularly *Mathias v. Yetts*, *sup.*, *per* JESSEL, M.R., at p. 502 (where he says that "forgetting a fact" does not prevent a representation being fraudulent "in law," by which he means an innocent misrepresentation, but one which is amenable to proceedings for rescission), and see Sir JAMES HANNEN, at p. 504.

(*l*) *Brownlie v. Campbell* (1880), 5 App. Cas. 925, H. L., *per* Lord SELBORNE, L.C., at p. 936, Lord HATHERLEY at p. 945, and Lord BLACKBURN at p. 953.

CHAPTER VI.

INDUCEMENT AND MATERIALITY.

113. HAVING considered, in the preceding Chapter, the legal consequences of the representor's state of mind, in making a misrepresentation, it now becomes necessary to deal with the representee's mental condition when receiving it. Of the two inquiries the latter is of the greater importance because it is of universal application, whereas the former is only important in certain forms of proceeding. Whether damage or rescission be sought, the plaintiff is out of court unless he establishes inducement and materiality (*a*); but it is only where deceit is alleged that the question of the representor's fraud or innocence has any relevance.

114. Inducement and materiality are two separate and distinct facts, just as malice and absence of reasonable and probable causes are, in actions of malicious prosecution. Both must be proved (*b*); it is of no avail to show that the representee was in fact induced to act to his prejudice by a falsehood, unless that falsehood was of a nature to induce any normal person to so act in the circumstances of the case; whilst, on the other hand, it is useless to show the *a priori* probability of its proving an inducement, unless it is shown that it did in fact induce. It is true that in certain extreme cases inducement may be inferred as a fact from materiality (*c*), just as, in malicious prosecution, there are cases where malice may be inferred as a fact from very gross want of probable or reasonable cause; but in neither province of the law does this circumstance negative the existence of the clear distinction between the two *alleganda et probanda*, each of which must be separately established as a fact (*d*).

(*a*) *Vide post*, Chapters X, XI, XII, XIII, XIV.

(*b*) *Smith v. Chadwick* (1884), 9 App. Cas. 187, H. L., *per* Lord SELBORNE, L.C., at p. 190: "secondly, he" (the plaintiff) "must establish that this fraud was an inducing cause to the contract, for which purpose it must be material, and it must have produced in his mind an erroneous belief, influencing his conduct."

(*c*) *Vide post*, Sect. 3, Sub-s. (1).

(*d*) Warranty, or an express condition or term in a contract, of course, gets rid of all questions of both inducement and materiality: *Parson v. Watson* (1778), Cowp. 785 (*per* Lord MANSFIELD, C.J., at pp. 788-790); *Atwood v. Small* (1838), 6 Cl. & Fin. 232 (*per* Lord BROUGHAM, at p. 444); *Thomson v. Weems* (1894), 9 App. Cas. 671, H. L. (*per* Lord BLACKBURN, at pp. 683, 684, and Lord WATSON, at p. 689); *Hambrough v. Mutual Life Insurance Co.* (1895), 72 L. T. 140, C. A.; and the insurance cases generally.

SECT. 1. INDUCEMENT.

115. Inducement in fact, as distinguished from a tendency to induce (which is materiality), is, *ex vi termini*, a question of fact (*e*), and the burden of proving it is, as already stated, on the representee. However likely a misrepresentation may have been to influence an average individual,—however “calculated” (in both senses of the word) it may have been to lead a normal representee to take just the steps which he did take,—however inconceivable even it may be that he could have remained insensible to the allurements held out,—yet, if in fact he was not induced, the misrepresentation is not actionable (*f*). It now becomes necessary to consider what are the precise elements in this burden of proof, and what are the contents and limits of the conception of “inducement.”

Sub-sect. (1). Burden on Representee of proving that the Representation was made with the object and result of inducing.

116. Inducement in fact is shown by proof that the representation was made both with the object, and with the result, of inducing the representee to alter his position (*g*). Neither element suffices without the other. To prove the representor’s intention to produce the effect comes to nothing, unless the effect itself be proved; and to establish the result is idle, unless it be shown that the representor actually, or presumptively, intended to bring it about. And the representor is presumed to have so intended, if he wilfully used language calculated, or of a nature, to induce a normal person in the circumstances of the case to act as the representee did (*h*);

(*e*) *Vide post*, Sect. 3.

(*f*) For instance, nothing could have been more calculated to induce the representee to purchase shares than the prospectus and scrip-certificates in *Shrewsbury v. Blount* (1841), 2 M. & G. 475, but the jury chose to find that in fact he was not so induced, and the Court of C. P. refused to disturb the verdict. Again, in *Smith v. Chadwick* (1884), 9 App. Cas. 187, H. L., it was obvious that a statement in the prospectus as to a certain person being one of the directors (which was false) must have made a deep impression on any person of ordinary business habits and experience acquainted with the particular trade and locality, and both Lord SELBORNE, L.C., at p. 190, and Lord BLACKBURN, at p. 194, expressed no little astonishment that the plaintiff had not professed to rely upon it: but, so far from doing so, he admitted in cross-examination that in fact he was not influenced by any of the names on the “front page,” (see p. 194), but solely by statements in the body of the prospectus as to output and profits, which were ambiguous, and to which he steadily refused to assign any particular meaning; it was impossible, therefore, that, being unable, on his own admission, to prove that he was in fact induced by the only misrepresentation which was both intended, and likely to, mislead him, he could succeed in his claim.

(*g*) See Article 17 of the Code. This is supposed to be expressed by the common formula: “the representation must be one *dans locum contractui*.” But this expression is not very felicitous or exact: *dans locum* is too broad, since it would obviously include any sort of contracts for the making of which a representation may give the occasion or opportunity, which is a very different thing from inducement; and *contractui* is too narrow, because the rule applies to many modes of altering a man’s position on the faith of a representation, besides the entering into a contract with the representor, or with any one.

(*h*) Hence it follows that the question of materiality is very much involved in the question of the presumptive intention of the representor, and the authorities cited *post*, under Sect. 2 (which deals with materiality) are *ad rem* to so much of § 118, *post*, as deals with the representor’s *presumed* intentions, and *vice versa*. See also several of the cases cited in Ch. VII, Sect. 2, *post*, as to presumptively intended damage.

whilst, on the other hand, he is presumed not to have so intended, or, rather, the representee cannot claim to have been so induced, if the representor was under no duty to make a truthful representation, or a representation at all, or was under a duty to tell a falsehood (i).

117. The proposition that there is nothing actionable in a mere intention to induce which fails of its effect altogether, would seem to be sufficiently obvious. "An action cannot be supported for telling a bare naked lie," as was said by BULLER, J., in one of the earliest of the misrepresentation authorities (k), or, to apply the equitable metaphor of a more recent judgment, "a man may with impunity lie in gross . . . but he cannot . . . tell a lie appurtenant" (l). In such a case the representor's

". . . act did not o'ertake his bad intent,
And must be buried, but as an intent,
That perished by the way" (m).

The class of case, however, where the representee was undoubtedly moved by something, but where there are several possible motives and inducements besides the misrepresentation, has occasioned some doubt and difficulty, which is the justification for the large number of decisions dealing expressly with the point, and for the many successive restatements of the rule, in more or less elaborate terms, by various judges from Lord BROUGHAM, L.C., to Lord SELBORNE, L.C. The former of these Lord Chancellors expressed his views on the question with the utmost precision and detail: "Thirdly and chiefly," he says, after enumerating two of the ingredients in any proceeding for misrepresentation, "it should be this false representation which gave rise to the contracting of the other party. *Dolus dans locum contractui* is the language of the civil law, not *dolus malus* generally; not the mere fraudulent conduct of the party trying to overreach his adversary; nor mere misconduct and falsehood throughout, unless *dedit locum contractui*" (n); then, after reviewing the previous decisions, he proceeds—"Now, my lords, what inference do I draw from these cases? It is this, that general fraudulent conduct signifies nothing; that attempts to overreach go for nothing; that an intention and design to deceive may go for nothing, unless all this dishonesty of purpose, all this fraud, all this intention and design, can be connected only with the particular transaction, and not only connected with the particular transaction, but must be made to be the very ground upon which this transaction took place, and must have given rise to this contract. If a mere general intention to overreach were enough, I hardly know a contract, even between persons of very strict morality, that could stand; we generally

(i) *Vide post*, § 119.

(k) In *Pasley v. Freeman* (1789), 3 Term. Rep. 51, *per* BULLER, J., at p. 56.

(l) *Per* NORTH, J., in *Archer v. Stone* (1898), 78 L. T. 34. He defines a "lie appurtenant" as follows: "that is to say, if he tells a lie relating to any part of the contract, or its subject-matter, which induces another person to contract," etc.

(m) "Measure for Measure," Act V. Sc. 1.

(n) *Atwood v. Small* (1838), 6 Cl. & Fin. 232, H. L., at p. 444.

find the case to be that there has been an attempt of the one party to overreach the other, and of the other to overreach the first; but that does not make void the contract. It must be shown that the attempt was made, and made with success, *cum fructu*. The party must not only have been minded to overreach, but he must actually have overreached . . . and, moreover, the representations so made must have had the effect of deceiving the purchaser; and, moreover, the purchaser must have trusted to these representations, and not to his own acumen, not to his own perspicacity, not to inquiries of his own" (o). And to the same effect, but in much terser language, Lord SELBORNE, L.C., observes, in reference to a case where the representee was a vendor—in the last case the representee was a purchaser—that "if the vendor was not *in fact* misled, the contract could not be set aside, because a *dolus* which neither induced nor materially affected the contract is not enough" (p). Accordingly, whenever the representor has failed to discharge the burden of establishing that he was *in fact* induced, he has failed altogether. This failure may arise from proof or admission that he relied *solely* (q) on something other than the misrepresentation on which his action or defence is founded, whether that "something" be an assurance or certificate or warranty which he insisted on obtaining, and obtained (r), or a statement in the prospectus or document the subject of the proceedings, other than the particular representation alleged to have been the inducing cause (s), or the representee's own skill or judgment (t), or his own general knowledge of business, or faith in the venture, or special inquiries or researches (u), or actual knowledge of the truth (x). Or, without the representor proving out of the representee's own mouth, or otherwise, any of such affirmative matters—and there is no onus on him to do so—the representee may simply fail to establish what is incumbent on him, either because he cannot even swear that he saw or read the document alleged to contain the misrepresentation (y), or that

(o) *Ibid.*, at pp. 447, 448.

(p) *Coaks v. Boswell* (1886), 11 App. Cas. 232, H. L., at p. 236.

(q) Mere proof that he relied on something *in addition* to the misrepresentation sued upon does not negative the fact of inducement, if otherwise proved: see Sub-s. (2), *inf.*

(r) As in *Flinn v. Headlam* (1829), 9 B. & C. 693, where the jury found that the plaintiff relied solely upon a certificate of seaworthiness, which he insisted on and obtained, and not on the alleged misstatements as to the vessel's cargo.

(s) As in *Re Northumberland and Durham District Banking Co., Ex parte Bigge* (1858), 28 L. J. (Ch.) 50, where the shareholder was not misled by the reports and accounts of the company, which was the case set up by him, but solely by the oral statements of an individual director. He had never even seen these reports and accounts. So, also, in *Baty v. Keswick* (1901), 85 L. T. 18, the plaintiff was shown to have relied on the names of the directors, and not on the statements in the body of the prospectus, as alleged by him in his claim.

(t) As in *Hills v. Balls* (1857), 2 H. & N. 299 (purchase of glandered horse).

(u) See *Bellairs v. Tucker* (1884), 13 Q. B. D. 562, Div. Ct., *per* MANISTY, J., at p. 582 (as to "personal knowledge of business," and "faith in the product," etc.); and, as regards reliance by the representor on his own investigation and skill, see the last sentence of the passage cited in the text from Lord BROUGHAM's judgment in *Atwood v. Small*, *sup.*

(x) *Vide post*, Ch. X, Sect. 2, Sub-s. (1).

(y) As in *Re Northumberland, &c., Co., Ex parte Bigge*, *ubi sup.*

it was addressed to, or intended for him, or a class of which he was a member (z); or because he never examined the article, the active concealment of defects wherein is alleged to have constituted the misrepresentation (a); or because he determined to take the risk, whatever it was (b); or for other reasons (c).

118. The converse of the above proposition is not less well established by authority, or less obvious in principle. It stands to reason that it is not every false statement by which another is *in fact* induced to alter his position for the worse, which is actionable, for, as Lord DENMAN, C.J., pointed out, "if every untrue statement which produces damage to another would found an action at law, a man might sue his neighbour for . . . having a conspicuous clock too slow, since the plaintiff might be thereby prevented from attending to some duty, or acquiring some benefit" (d), or, to adopt the illustration put by COLERIDGE, J., in a later case, if "a person coming from abroad publishes a false account of a mining district . . . a party going out in consequence, and suffering loss," would on that theory "be entitled to sue" (e); or, as DENMAN, J., said in a still more modern authority,

(z) As in *Salaman v. Warner* (1891), 65 L. T. 131, C. A. (the report of this case in [1891] 1 Q. B. 734, C. A., does not deal with the defects of the statement of claim, but only with a preliminary point of practice), where the addressing of the prospectus to the class of purchasers in the market, of whom the plaintiff was one, and the consequent inducement, was not alleged, or not sufficiently alleged; and *Sleigh v. Glasgow and Transvaal Options, Ltd.* (1904), 6 F. 420, where the prospectus had not been issued to the public.

(a) This was the case in *Horsfall v. Thomas* (1862), 1 H. & C. 90 (see the observations of BRAMWELL, B., at p. 99, who there points out that "the defendant never examined the gun, and therefore it is impossible that an attempt to conceal the defect could have had any operation on his mind or conduct. If the plug which it was said was put in to conceal the defect had never been there, his position would have been the same."

(b) *Seddon v. North Eastern Salt Co.*, [1905] 1 Ch. 326 (per JOYCE, J., at p. 335).

(c) See *Atwood v. Small* (1838), 6 Cl. & Fin. 232, H. L.; *Shrewsbury v. Blount* (1841), 2 M. & G. 475; *Vigers v. Pike* (1842), 8 Cl. & Fin. 562, H. L.; *Way v. Hearn* (1862), 13 C. B. (N. S.) 292 (per ERLE, C.J., at pp. 302, 303, WILLIAMS, J., at p. 305, and BYLES, J., at p. 307); *Central Railway Co. of Venezuela v. Kisch* (1867), L. R. 2 H. L. 99, 125; *Mathias v. Yelts* (1882), 46 L. T. 497, C. A. (per JESSEL, M.R., at p. 502, and Sir JAMES HANNEN at p. 504); *Bellairs v. Tucker* (1884), 13 Q. B. D. 562, Div. Ct. (where DENMAN, J., at p. 578, expressed the view that the jury's finding that the plaintiff had been materially induced was against the weight of the evidence); *Wasteney v. Wasteney*, [1900] A. C. 446, P. C. (at p. 451, where it was said to be "impossible to believe that the respondent was induced to execute the deed by representations as to his wife's chastity"); *Stevens v. Hoare* (1904), 20 T. L. R. 407 (per JOYCE, J., at p. 408); and *A. W. Gamage, Ltd. v. Charlesworth*, [1910] Sc. Ct. of Sess. Cas. 257 (where the company's manager was not called to prove the inducement, but only an assistant counting-house manager).

(d) At p. 208 of *Barley v. Walford* (1846), 9 Q. B. 197.

(e) Put in the form of a *reductio ad absurdum* to counsel arguing for the plaintiff, at p. 485 of *Gerhard v. Bates* (1853), 2 E. & B. 476, to which, however, a perfectly sound answer was given, that the representer in the case put would be liable if, but not unless, there were an *intention* to produce the result mentioned, and the result followed; and this (it was contended, and ultimately established) was the case then before the court. Counsel for the defendant, at a later stage (p. 486), seized upon the illustration of COLERIDGE, J., and put it in a more general form: "a lecturer might just as well be liable to every one who heard him, if he stated an untruth," to which Lord CAMPBELL, C.J., made the same answer that the plaintiff's counsel had made to the above question of COLERIDGE, J., viz. that the lecturer undoubtedly would be liable if, but only if, the statement were "fraudulently made, and with the *intent* to produce the evil."

in which it was held that an incorrect entry in Lloyd's Register did not give a cause of action to a person to whom it was not expressly or impliedly intended to be put forward as an inducement to do anything:—"it would be . . . almost as great a stretch to say that if, in a public directory, there were the statement of an address of a firm which was inaccurate . . . that then any one of the public who had to pay a large sum for a journey to go to that place to do business with that firm would have a cause of action against the proprietors of that directory for that statement" (*f*). There must clearly be a *purpose* on the part of the representor to induce the particular representee, or a class of which he forms one, to act upon the representation, as well as the fact that he did act upon it. The representor must have at least had this person, or class of person, in his mind, and must have foreseen the probability of his, or their, being induced, in order to render him liable. There must not only have been a *suasio*, but also an *animus suadendi*. Where the statement is made, if it can be said to be made at all, to the representee (*g*) *alio intuitu*, as in the case put of the owner of the clock, the lecturer, or the proprietor of a registry or directory, the representor, *if nothing more is shown*, cannot be responsible, however clearly it be demonstrated that some person did in fact rely upon it, and however heavy the loss which resulted from such reliance. That is to say, no intent is presumed from such representations in themselves. To make them actionable an express intent must be alleged and proved, as well as the *fructus*, as Lord BROUGHAM puts it (*h*). In every case where there has been no such allegation, the declaration or statement of claim has been held bad on demurrer, or struck out (*i*); where that has, the pleading has been held good (*k*). Similarly, where there has been no proof at the trial of this necessary averment, the representor has failed (*l*); where

(*f*) *Thiodon v. Tindall* (1891), 65 L. T. 343, Div. Ct., at p. 348.

(*g*) *Vide post*, Ch. VIII, Sect. 2.

(*h*) In *Atwood v. Small* (1838), 6 Cl. & Fin. 232, H. L., at pp. 444, 447, 448. The passage is cited in § 117, *sup*.

(*i*) In *Salaman v. Warner* (1891), 65 L. T. 132, C. A., the plaintiff did not allege in his statement of claim either an intention on the part of the defendants to induce him to purchase the shares, or that he was in fact induced; the statement of claim was accordingly struck out.

(*k*) The demurrer to the declaration in both *Barley v. Walford*, and *Gerhard v. Bates, sup.*, was overruled.

(*l*) *Way v. Hearn* (1862), 13 C. B. (N. S.) 292, where the defendant (who set up the plaintiff's misrepresentation as an affirmative defence to the action) failed to prove that the plaintiff had any intention to deceive or mislead him, or any other intention than to conceal a certain indebtedness from his wife (*per* ERLE, C.J., at pp. 302, 303, WILLIAMS, J., at p. 305, and BYLES, J., at p. 307); *New Brunswick and Canada Railway and Land Co. v. Conybeare* (1862), 9 H. L. C. 711, where it was held that the communication by the appellant company's secretary was not made "with any reference to any statement of the respondent that he wished to buy shares," and would not, therefore, be supposed to have been intended to influence him, or to bind the company; *Thiodon v. Tindall, ubi sup.*; *Baty v. Keswick* (1901), 85 L. T. 18, where FARWELL, J., thought that no intention had been shown to induce underwriters, of whom the plaintiff was one, as distinct from investors, to underwrite shares by the alleged misrepresentations in the body of the prospectus; *Sleigh v. Glasgow and Transvaal Options, Ltd.* (1904), 6 F. 420, where it was not proved that the directors had ever issued the prospectus to any one but certain business friends, or could therefore have

there has, he has succeeded (*m*). Many other illustrations, besides those which have formed the subject of actual decision, may be suggested. Thus, where the parties are at arm's length, each expecting the other to attempt to mislead or overreach him, neither can assert an actionable intention to induce. Of him who is "fit for treasons, stratagems, and spoils," it is said "let no such man be trusted;" but if the other party is expecting the "treasons, stratagems, and spoils," and is practising them himself, they are *arcades ambo*, and neither can claim to have been betrayed by the other. This was the ground of Macaulay's apology for Clive's proceedings in India, and was Odysseus' justification for his own tortuous methods (*n*). Everything is fair in love and in war. He who uses mines and spies must not complain of countermines and counterspies. *Dolus, an virtus, quis in hoste requirat?* There is no question of intention to induce, or of inducement, when it is a case of "shooting at sight," or of several professed card-sharpers sitting down to cheat one another. So of diplomacy, where the astute diplomatist is deceived by nothing so much as the truth (*o*). In all such circumstances and relations, deceit does not deceive. *Haud decipitur qui scit se decipi*. So in the exchange of gifts between Homeric heroes of the olden time (*p*), or oriental princes of the present, no intention could be imputed to either

thereby intended to induce the plaintiff, who was not one of these specific addressees, to subscribe for shares; and *A. W. Gamage, Ltd., v. Charlesworth*, as to which see note (*c*), *sup*.

(*n*) In *Andrews v. Mockford*, [1896] 1 Q. B. 372, C. A., it was distinctly alleged that the defendants by the prospectus which they issued, and by a subsequent fabricated telegram which they caused to be published in the financial papers, intended to, and did, induce the plaintiff to purchase shares *in the market*. This express and actual intention (for none such could be implied from the mere issue of the prospectus, the office of which is ordinarily exhausted on allotment) of course had to be proved, and was proved. The question of intention to induce was one of those left to the jury specifically by Lord RUSSELL, C.J., and was answered by them in the affirmative, and the C. A. held that there was abundant evidence on which the jury could so find. Similarly in the curious case of *Gordon v. Street*, [1899] 2 Q. B. 641, C. A., where the defendant set up as a defence to the action that the plaintiff, a notorious usurer, had misrepresented and suppressed his identity, BUCKNILL, J., was careful to leave to the jury the question whether the plaintiff intended to, as well as whether he did in fact, induce the defendant to contract with him, and, again the C. A., the jury having found both of these issues in favour of the defendant, refused to disturb the verdict.

(*n*) Soph. Philoct. 1049: οὐ γὰρ τοιούτων δέι, τοιοῦτος εἰμ' ἐγώ.

(*o*) See the story of Sir Henry Wotton's advice to a young ambassador, used by ALDERSON, B., at p. 159 of *Moens v. Heyworth* (1842), 10 M. & W. 147. Cp. the conception of *dolus bonus* in Roman law, which comprised the legitimate artifices employed in warfare or in the conduct of litigation: *vide post*, App. C, Sect. 1.

(*p*) Diomedes concludes his speech to Glaucus with the proposition for the exchange—

τεύχεα δ' ἀλλήλοισ ἐπαμείψομεν, ὕφρα καὶ οὔδε
γνώσιν ὅτι ξείνοι πατρώιοι εἰς ἰχόμεθ' εἶναι,

whereupon the narrative (with the poet's criticism of Glaucus as a man of business) proceeds—

ὥς ἄρα φωνήσαντε καθ' ἴππων ἄϊξαντε
χείρας τ' ἀλλήλων λαβέτην καὶ πιστώσαντο·
ἐνθ' αὐτὲ Γλαῦκῳ Κρονίδης φρένας ἐξέλατο Ζεὺς,
ὃς πρὸς Τυδείδην Διομήδεα τεύχε' ἄμειψε,
χρῦσα χαλκείων, ἑκατόμβοι' ἐννεαβοίων.

party to induce the other to make a present of greater value than his own ; and, in the famous Diomedean exchange (*g*), Glaucus would have had no cause of action against Diomedes. Again, a man who overhears a conversation, or gets sight of a document not addressed to him, and acts upon what he so overhears or overlooks, whether it be the latest intelligence from the seat of war, or something direct “from the stables,” or secret news of a rich lode having been struck in a mining estate, or of the intentions of a government, or a board of directors of a company, has no cause of complaint against any one if the intelligence proves false, for the simple reason that he was not the person, or among the persons, intended to be influenced by the statement. But, if there is any evidence whatever that the representor did in fact contemplate or foresee that any such representation would, in the ordinary course of events or in the special circumstances of the case, not only come to the notice of, but be acted upon by, any person other than those directly addressed, or for any purpose other than the apparent purpose, the case is altered, and the evidence must be considered. Thus, to take the three illustrations given by Lord DENMAN, C.J., COLERIDGE, J., and DENMAN, J., respectively, let it be supposed that the owner of the “conspicuous clock” is asked the time by a rival trader, who, to his knowledge, will receive a valuable order if he punctually keeps a certain appointment (the order otherwise probably coming to himself), and, in answer to the question, silently points to his clock which he knows to be a quarter of an hour too slow, and, which, if relied upon, would result in the rival trader being too late for the appointment, it cannot be doubted that an express intention to induce would be established. The same result would follow if the lecturer or traveller mentioned by COLERIDGE, J., though, to all appearances, merely instructing his audience in the mineralogy or geology of a mining district, or in the social conditions of a newly discovered country, or in the scientific or mechanical points of a newly invented machine, were found to be materially interested in the mining or farming estates, or in the discovery or invention, the merits of which he had been describing, and knew or foresaw that his audience would immediately subscribe for shares in a company formed to develop or exploit these properties ; or, if the proprietors of the shipping register, in the last of the above three cases, had been shown to have also owned the vessels, and to have sent out a false description of them to specific persons known to be likely buyers. A man may deliver addresses, or write books or articles, on alleged discoveries and experiences, which are full of inaccuracies, or even, as in the case of the notorious Louis Rougemont, and the still more notorious Dr. Cook, downright impudent falsehoods, or he may be one of the long list of “literary forgers” ; but so long as these falsehoods serve merely to

(*g*) Diomedes certainly intended to induce Glaucus to make the exchange, but not that he should alter his position in a material sense (though in fact this was the result), because he was not aware of the comparative value of Glaucus’s armour, which, for aught he knew, might have been worth less than nine oxen, instead of a hundred.

gratify the megalomaniac impulses of a disordered imagination, and realize nothing more than diplomas, certificates, honorary degrees, banquets, bouquets, and other *supervacuus honores*, no intention to induce any one to alter his position can be inferred (*r*); it is a very different matter, however, when the lecturer or writer or literary forger receives cash which passes, to his knowledge, on the faith of the genuineness of the supposed experiences or discoveries (*s*).

119. When a statement is made in answer to a question which the representee has no right to ask, the latter cannot claim to have been induced to act on the faith of the statement, or complain of having been misled by the representor, should it turn out to be incorrect; because in such a case the representee brings the consequences on himself; he invites the statement, and takes the risk of its falsity. This is the real ground of the proposition that "the case of a simple lie, where the party is under no obligation to tell the truth, gives no cause of action" (*t*). Thus, where a money-lender, a perfect stranger, inquired of the trustee of an estate in which the proposed borrower was interested, as to the incumbrances on the estate, and the trustee, in giving gratuitously and voluntarily the information requested, omitted to mention a certain incumbrance which had escaped his memory, it was clear that, not having intended to induce the money-lender to do anything, he could not be held liable to him on any principle of law (*u*), though there had been at least one decision to the contrary, which the Court of Appeal promptly and decisively overruled (*x*). So a false (and, as in such a case it must necessarily be, a deliberately false) representation, in answer to an impertinent question as to the identity of an author who has chosen to write anonymously or pseudonymously, entails no responsibility in law (*y*), even though the questioner may have been in fact misled thereby into taking some step to the prejudice of his interests. Why? Because the representor is entitled to mislead, for the purpose of preserving his right to anonymity. A refusal to answer would be to give the answer required. To put the

(*r*) As to the curious vanity, without thought of material lucre, which has prompted many of the literary forgeries referred to, see Bentley's celebrated *Dissertation on the Letters of Phalaris*.

(*s*) Cp. the Shakespearian forgeries of Ireland, by which he obtained large sums of money, and for which he was ultimately convicted and sentenced. Louis Rougemont similarly derived substantial profit from the accounts of sensational adventures which he fabricated and published in a magazine, and so (for a time) did the impostor Cook, from the lectures he delivered on his supposed discovery of the North Pole.

(*t*) *Collins v. Cave* (1859), 4 H. & N. 225, *per* POLLOCK, C.B., at p. 232. This decision was affirmed by the Exchequer Chamber (1860), 6 H. & N. 131.

(*u*) *Low v. Bouverie*, [1891] 3 Ch. 82, C. A., *per* LINDLEY, L.J., at pp. 99-101. And in a much earlier case, *Merewether v. Shaw* (1816), 2 Cox Eq. Cas. 124, it was held that a man honestly answering questions addressed to him as to his sister's fortune by her intended husband, could not be answerable for any incorrectness in his answer (see pp. 134, 135).

(*x*) *Slim v. Chroncher* (1860), 1 De G. F. & J. 518, is the decision referred to. It was pronounced to be no longer law by LINDLEY, L.J., at p. 101, and BOWEN, L.J., at p. 106, of *Low v. Bouverie*, *sup.*

(*y*) Nor, probably, according to sound principles of ethical casuistry. *Vide post*, App. B, Sect. 2.

pursuer off the scent is a legitimate, and often the only available, means of nullifying the illegal pursuit of game. Though the author's object is to mislead, his object is not to induce the inquirer to alter his position, but to preserve intact his own. No man can claim to have been induced—certainly not to have been intended to be induced—by a statement which he had no business to elicit or extort (z). The reason and principle of the rule may be illustrated by contrasting the above class of question and answer with the class of inquiries which the one party has a right to make, and replies thereto, which the other is bound to give, if at all, truthfully and honestly; as, for instance, where the character of a servant is asked for. Here the representor knows that the question is asked for no other purpose than to enable the representee to determine whether or not to employ the servant, and knows, therefore, and intends that his answer to the question is to operate as a direct inducement to action of one kind or the other. There are other cases, of the kind mentioned by BRAMWELL, B., where there is not only no duty or obligation to tell the truth, but where there is “a duty or obligation the other way, which, it might be said, would be, when one sought to buy poison to murder another” (a).

Sub-sect. (2). Coexistence of other Inducing Causes does not negative Inducement.

120. It is sufficient to prove that the representation was *an* inducing cause. It is not necessary to establish that it was *the* inducing cause. Whether, if a full disclosure of the truth had been made, the representee would or would not have altered his position in the manner in which he did, is a question which the law does not require him to answer. It is enough if a full and exact revelation of the material facts *might* have prevented him from doing so—if it would have “given him pause” (b). As

(z) So Harold reasons, in reference to the fatal promise which William had extorted from him, in Tennyson's *Harold* (Act IV, Sc. 2):

“he called my word my bond:
He is a liar, who knows that I am a liar,
And makes believe that he believes my word,
The crime be on his head.”

The theory is burlesqued by Butler in his “Hudibras:”

“He that imposes an oath, makes it,
Not he that, for conscience, takes it;
Then how can any man be said
To break an oath he never made?”

(a) *Cave v. Mills* (1862), 7 H. & N. 913, at p. 930. Cp. Horne Tooke, *Diversions of Purley*, Part II, Ch. V: “to speak truth may be a vice, as well as a virtue, for there are many occasions when it ought not to be spoken.” See, again, App. B, Sect. 2, *post*.

(b) *Reynell v. Sprye*, *Sprye v. Reynell* (1852), 1 De G. M. & G. 660, *per* Lord CRANWORTH, L.J., at p. 708; *Re London and Leeds Bank, Carling's case* (1887), 56 L. J. (CH.) 321, *per* STIRLING, J., at pp. 323, 324. The views on this point expressed by ROMILLY, M.R., at p. 96 of *Pulsford v. Richards* (1853), 17 Beav. 87, and again at pp. 238, 239, of *Jennings v. Broughton* (1853), 17 Beav. 234, cannot now be accepted as law.

against the wrong-doer, when once it is proved that the representation had an influence upon the mind and conduct of the representee, no burden is placed upon the latter, or right conferred upon the former, of conjecturing what would have happened if certain things had been said which, in fact, had not been. "Can it be permitted," said Lord CHELMSFORD, L.C., "to a party who has practised a deception, with a view to a particular end which has been attained by it, to speculate on what might have been the result if there had been a full communication of the facts?" (c) Again, "I do not think," said JAMES, V.-C., "a Court of Equity is in the habit of considering that a falsehood is not to be looked at because, if the truth had been told, the same thing might have resulted" (d); or, as it was put by BYRNE, J., in a prospectus case, "'would you have taken the shares if something had been left out, and something else put in?' is an extremely difficult question to answer" (e), and one which the representor is not entitled to ask, and to which the representee can give a properly adequate reply by saying, "I cannot say; I have never seen such a prospectus."

121. It follows that, when once it is shown that the misrepresentation was an inducing cause of the alteration of position, it is no answer to set up and prove that other matters, being in the nature of *res inter alios actæ*, coexisted and co-operated in producing the result (f). Except as between the parties, the inducement which it is required to establish need not have been the sole, or even the main, or substantial, inducement (g).

Sub-sect. (3). The Entirety of Statements or Documents (where more than one) to be considered.

122. In the case of what may be called a complex representation, that is to say, a representation which is compounded of several more or less

(c) *Smith v. Kay* (1859), 7 H. L. C. 750, at p. 759, a passage cited, and applied, by A. L. SMITH, L.J., at p. 646 of *Gordon v. Strick*, [1899] 2 Q. B. 641, (C. A.).

(d) *Re Imperial Credit Mercantile Association* (1869), L. R. 9 Eq. 225 n. (at p. 226 n.).

(e) *Dringbier v. Wood*, [1899] 1 Ch. 393, at p. 404.

(f) This is expressed in Article 17 (i) of the Code. See *Atwood v. Small* (1838), 6 Cl. & Fin. 232, H. L. (per Lord BROUGHAM at p. 448); *Re Royal British Bank, Ex parte Nicol* (1859), 3 De G. & J. 387 (per Lord CHELMSFORD, L.C., at p. 422); *Higgins v. Samels* (1862), 2 J. & H. 460 (per PAGE-WOOD, V.-C., at p. 468); *Mathias v. Yeltes* (1882), 46 L. T. 497, C. A. (per JESSEL, M.R., at p. 502); *Edgington v. Fitzmaurice* (1885), 29 C. D. 459, C. A. (per COTTON, L.J., at pp. 480, 481, BOWEN, L.J., at pp. 483, 484, and FRY, L.J., at p. 485, agreeing with the opinion of DENMAN, J., expressed at pp. 466, 471, 472); *Re London and Leeds Bank, Carling's case, ubi sup.*; and *Dringbier v. Wood, sup.* (per BYRNE, J., at pp. 404, 405).

(g) In *Tatton v. Wade* (1856), 18 C. B. 371, Exch. Ch., there had been both a written and a subsequent oral misrepresentation, as to the credit of a third person. It was material, therefore, to show that the plaintiff was induced by the former, since otherwise Lord Tenterden's Act would have been a bar to recovery. In examination in chief, the plaintiff had said that she would not have given credit to the third person but for the oral statement, but in cross-examination she asserted that she would not have done so but for the original representation in writing. CROWDER, J., asked the jury whether she was "mainly and substantially" induced by the written representation. The Exchequer Chamber held that this question was a proper one, and not, as the defendant urged, too favourable to the plaintiff, since inducement is inducement, though there may be others, and no one is ever influenced to take any step in life by

interconnected statements contained in one document (such as a prospectus, an advertisement, particulars of sale, and the like), or made at one conversation or interview, or in the case of a representation the effect of which is to be gathered from a number of documents or conversations, related to one another by express reference or community of subject-matter, it is a primary rule that, for the purpose of determining the issue of inducement, the effect on the representee's mind of the entirety of the statements, conversations or documents must be considered, rather than the effect of any particular passage, statement, or document, apart from the others (*h*). Thus where a shareholder had given general evidence that he was induced by a prospectus to take shares in the company, and was then asked to point out the particular passages in the prospectus on which he relied, KINDERSLEY, V.-C., with reference to this situation, observed: "he" (the shareholder) "says, 'I decline to answer the question; the documents speak for themselves.' I think he was justified in that. He is not obliged to enter into any argument to prove on what particular passages in the prospectus he forms the impressions which he states he drew" (*i*). Similarly, but with more emphasis and elaboration, Lord HALSBURY, L.C., sitting in the Court of Appeal, has said: "it is an old expedient, and seldom successful, to cross-examine a person who has read a prospectus, and ask him, as to each particular statement, what influence it had on his mind, and how far it determined him to enter into the contract. This is quite fallacious; it assumes that a person who reads a prospectus, and determines to take shares on the faith of it, can appropriate among the different parts of it the effect produced by the whole. This can rarely be done even at the time, and for a shareholder thus to analyze his mental impressions after an interval of several years, so as to say what representation in particular induced him to take shares, is a thing all but impossible. A person reading the prospectus looks at it as a whole . . . and on the whole he forms his conclusion. You cannot weigh the elements by ounces" (*k*). This rule has been since restated by Lord HALSBURY in the House of Lords (*l*), and has been freely cited and applied by the courts generally in other prospectus

one inducement alone (*per* POLLOCK, C.B., at p. 385, WIGHTMAN and CROMPTON, J.J., at p. 387, and BRAMWELL, B., at p. 388). It was not necessary to consider whether the importation into the question of the qualifications "mainly" and "substantially" did not render it too favourable to the defendant, though it would appear, from what WIGHTMAN, J., and ALDERSON, B., threw out in the course of the argument, at p. 379, that both these judges were inclined to that opinion.

(*h*) This is Article 17 (ii.) of the Code. As to the necessity of considering the entirety of a complex representation for the purpose of determining its truth or falsity, see Ch. IV, Sect. 4, Sub-s. (3).

(*i*) At pp. 379, 380 of *New Brunswick and Canada Railway and Land Co. v. Muggeridge* (1860), 1 Dr. & Sm. 363.

(*k*) At p. 369 of *Arnison v. Smith* (1888), 41 C. D. 348, C. A.

(*l*) *E.g.*, at p. 344 of *Derry v. Peek* (1889), 14 App. Cas. 337, H. L. ("I do not believe that any one can so far analyze his mental impressions as to say what particular fact in a prospectus induced him to subscribe"), and again at p. 280 of *Aaron's Reefs, Ltd. v. Twiss*, [1896] A. C. 273, H. L. ("I must protest against its being supposed that, in order to prove . . . that a certain course of conduct was induced by it"—*sc.* a fraud—"a person is bound to explain with exact precision what was the mental process by which he was induced to act").

cases (*m*). Again, in the case of two documents such as, first, a prospectus, and then a telegram sent to the financial press from the mine to which the prospectus related, for the purpose of "strengthening the effect" of that prospectus, though it did not expressly refer to it, A. L. SMITH, L.J., delivered a decided opinion in these terms: "upon these findings there was proved against the defendants a *continuous fraud* on their part, commencing with the sending of the prospectus to the plaintiff, and culminating in the direct lie told in the telegram which was intended by the defendants to operate upon the plaintiff's mind. . . . It is *not taking the correct view of the case to sever it into parts* . . . and to argue that the prospectus by itself would not support a cause of action, and that the telegram by itself would not do, and since two nothings make nothing, the combination of the two does not support a cause of action. *The case must be taken as a whole*" (*n*).

123. Where, however, there is no express reference in one of two documents or statements to the other, and the two neither purport to be, nor are, qualifications upon, or supplementary to, one another, the representee is entitled to allege, and prove, if he can, that he relied on one of the two, without reference to, or without even having seen or heard the other at all, though, if he had paid any attention to that other, the conjoint effect of both would have been such as to prevent any possibility of inducement (*o*); or, in any such case, he may say that he was influenced separately and independently by each of the two statements, so that an affirmative defence disentitling him to relief in respect of one of them may be entirely unavailing for that purpose in respect of the other (*p*).

Sub-sect. (4). Where Representee must assign the meaning in which he understood, and relied on, the Representation.

124. It has already been explained that where a representation fairly admits of more than one meaning, it is incumbent on the representee to state and prove in which of its possible meanings he understood it, and that it was false in the sense in which he relied upon it (*q*). The authorities

(*m*) See the observations of Lord HERSCHELL at p. 291 of *Aaron's Reefs, Ltd. v. Twiss*, *sup* ("the question to be determined was what idea would be conveyed to an ordinary man by a perusal of this prospectus, *viewing every statement contained in it in the light of the other statements to be found there*"), BYRNE, J., at p. 404 of *Dringbier v. Wood*, [1899] 1 Ch. 393, and COLLINS, M.R., at p. 551 of *McConnell v. Wright*, [1903] 1 Ch. 546, C. A. ("though the plaintiff had very great difficulty in fastening upon any particular misrepresentation which he could aver had influenced him in taking shares, still it was a question *whether he was misled by the prospectus as a whole*").

(*n*) *Andrews v. Mockford*, [1896] 1 Q. B. 372, C. A., at p. 382. Cp. what RIGBY, L.J., says at p. 383.

(*o*) Cp. Ch. X, Sect. 2, Sub-s. (1), *post*, and the cases cited thereunder, as to when a representor is, and when he is not, entitled to exculpate himself by reference to other statements and documents.

(*p*) *Re London and Provincial Electric Lighting and Power Co., Ex parte Hale* (1887), 55 L. T. 670 (*per* CHITTY, J.).

(*q*) *Vide ante*, Ch. IV, Sect. 4, Sub-s. (1).

cited in support of the above proposition (*r*) are also authorities for the proposition (which is the same, but in an inverted form) that the burden is on the representee of showing, in such cases, that he was induced by the representation in the sense in which it was false, or fraudulent, or otherwise actionable, according to the circumstances. "It is for him to say, 'I relied on the statement in this meaning, that is the meaning I took; if it is ambiguous, it is the fault of the defendant, and relying on that I entered into the contract.' But if the plaintiff will not tell us what he relied on; if he says to the court, 'Please to find out the meaning; I relied on the statements in the prospectus, and I relied upon them according to their meaning, whatever that meaning is;' surely that will not do. How can the court find out that he has been deceived at all? The court may think it means the very thing the plaintiff did not think it meant, and then are they to say he has been deceived because he took it in the wrong sense? That, of course, is impossible" (·). The representee cannot put himself in the position of the prisoner who, on being asked whether he was guilty or not guilty of the offence charged, disclaimed any preconceived opinion on the subject, and modestly replied: "that is what I want you gentlemen to tell me." Where there is only one possible sense, he is entitled to point to what is, in that only possible sense, and on the face of it a plain untruth, "but, if he cannot do this . . . he must prove a particular sense, and that he understood the representation, and acted on it, in that sense, and further that he reasonably so understood" (*t*).

SECT. 2. MATERIALITY.

125. Materiality is a distinct thing from inducement. Each is a question of fact, if there is any evidence at all (*u*), and each must be separately proved (*x*).

Sub-sect. (1). What Materiality means.

126. A representation is material when its tendency, or its natural and probable result, is to induce the representee to enter into the contract or transaction which in fact he did enter into, or otherwise to alter his position in the manner in which he did in fact alter it (*y*). The proposition has been variously expressed (*z*), but the above is the substance of it.

(*r*) See the cases cited in the notes to § 81, *ante*.

(*s*) JESSEL, M.R., at p. 45 of *Smith v. Chadwick* (1882), 20 C. D. 27, C. A., approved by the House of Lords (1884), 9 App. Cas. 187, H. L.

(*t*) KECKWICH, J., at pp. 808, 809 of *Capel & Co. v. Sim's Ships Composition Co.* (1888), 58 L. T. 807. See Article 17 (iii.) of the Code.

(*u*) *Vide* Sect. 3, *post*.

(*x*) Though, in certain extreme cases, inducement may be inferred as a fact from obvious materiality: *vide* Sect. 3, Sub-s. (2), *post*.

(*y*) This is Article 18 of the Code.

(*z*) "Of such a nature as would induce a person to enter into the contract, or would tend to induce him to do so," is the language of JESSEL, M.R., at p. 44 of *Smith v. Chadwick* (1882), 20 C. D. 27, C. A., whilst, in the same case in the House of Lords

The representation must be shown to have been capable of inducing, as well as the actual precursor and inducement, in order to satisfy the definition; just as, in the analogous sphere of defamation, a publication must not only have in fact injured a person's reputation, but must also have had a defamatory tendency (*a*).

127. For the purpose of determining the question of materiality in any case, as distinct from inducement, the views of either of the parties are (with the exception to be mentioned presently) of no importance whatever. If in any ordinary case a representation was not material, the fact that the representee thought at the time, or says at the trial, that it was, cannot make it so (*b*); on the other hand, the fact that the representee at the time considered a material representation to be immaterial, does not negative its *materiality*, though of course it destroys all prospect of establishing actual inducement. Still less, in any normal case, has the opinion of the representor any significance. If the statement by means of which he in fact induced another to alter his position was of a nature to produce that result in the ordinary course of events, such nature and tendency cannot be affected by any allegation (even if believed) of the representor that he did not, or does not, regard his representation as having that nature or tendency (*c*).

128. It must be remembered, however, that a tendency to induce means a tendency to induce the particular representee in the particular circumstances of the individual case. Where there are no special circumstances, it is necessary and sufficient to prove that, in the ordinary course of events, having regard to the relation of the parties and the nature of the business or transaction, the natural and probable effect of the representation was to influence the mind of a normal representee in the manner

(1884), 9 App. Cas. 187, H. L., Lord BLACKBURN, at p. 196, uses the expression—"of such a nature as would be likely to induce a person to enter into a contract." As to a "material contract" within s. 81 (11) of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), see the cases cited in Buckley, *Companies Acts* (9th ed.), p. 180, note (*f*), and in Lord Halsbury's *Laws of England*, title, "Companies," vol. v, pp. 123, 124. As applied to marine insurance, a "material representation" is defined in s. 20 (2) of the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), as "a representation which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take his risk."

(*a*) See *Capital and Counties Bank v. Henty* (1882), 7 App. Cas. 741 (*per* Lord BLACKBURN at pp. 769-778).

(*b*) In *Beachey v. Brown* (1860), E. B. & E. 796, an action for breach of promise of marriage, to which the defendant set up that he had been induced to make the promise by the lady's fraudulent concealment of certain material facts, CROMPTON, J., says, at p. 803: "I do not think that the non-disclosure of a fact which is material in the mind of the defendant is enough." This view would of course apply to a case of a positive misrepresentation as much as to one of concealment.

(*c*) Where there is a duty of disclosure, it is no excuse that the party failing in such duty considered the undisclosed matters not material, if in fact they were so: *Lindenau v. Desborough* (1828), 8 B. & C. 586 (*per* BAYLEY, J., at p. 592, and LITTLEDALE, J., at p. 593); *Dalglish v. Jarvey* (1850), 2 Macn. & G. 231 (*per* ROLFE, B., at p. 243); *London Assurance Co. v. Mansel* (1879), 11 C. D. 363 (*per* JESSEL, M.R., at p. 368). Still less would such a belief be an answer in the case of a misrepresentation of an actually material fact. Similarly, in defamation, the intention and meaning of the defamer is wholly irrelevant, as explained in Article 17 (5) of the author's *Code of the Law of Actionable Defamation*, and note (*e*) thereto.

alleged. But, to the knowledge of the representor, the representee may be an abnormal person, influenced by particular fancies, fads, or superstitions (*d*); or it may be that, again to the knowledge of the representor, there are circumstances of a character such that any statement respecting them, though it would be utterly inoperative on the mind of any other person, will make all the difference in the world to the particular representee to whom he addresses it; in which type of case it is obvious that the belief of the representor is all-important, because it is that belief alone which makes a representation material *as against him*, which would not be material as against any one else (*e*).

129. There is no occasion to refer to authorities illustrative of the former of the above two classes of material representation, as to which little difficulty has ever arisen; the materiality, or the want of it, being in most of them obvious, or not challenged (*f*); but the decisions relating to the latter type have given rise to nice questions, particularly those decisions in which the materiality, as between the parties, of a representation as to the

(*d*) It is matter of history, and common observation, that the acutest minds have been, and are, subject to the domination of special prejudices, antipathies, predilections, and superstitions; and that those whose life is spent in tempting fate *per mare per terram*,—soldiers, and “they that go down into the sea in ships, and have their business in great waters,”—and other classes, such as the theatrical profession, are peculiarly under such influences. Suppose that a representor knows that his representee will never sign a contract, or do any business, on a Friday, or on the 13th of a month, or enter upon any enterprise in which an individual believed to bring him ill-luck is concerned, and, with this knowledge, misrepresents the date of a contemplated or past transaction, or the *personnel* of those interested therein, it would seem that, on principle (no such extreme case has yet been the subject of any report), such a misrepresentation would be material as between the parties,—material, that is, *to the inducement*, which (see § 129) is all that is required to be established.

(*e*) *Higgins v. Samels* (1862), 2 J. & H. 460, *per* PAGE-WOOD, V.-C., at p. 468 (“he admits that he knew the lime would be useless to the defendant unless it was fit for the London market,”—which knowledge would deprive the representor of his right to contend that, if the lime was good and merchantable, the question of a particular market was immaterial); *Archer v. Stone* (1898), 78 L. T. 34, where the plaintiff had falsely represented to the defendant that he was not purchasing for a certain individual, and NORTH, J., in giving judgment for the defendant, based it on the fact that the plaintiff knew that the particular individual was so distasteful to the defendant that he would not have sold his land to him, or his “party,” or to any one through whom it would eventually get into his hands; *Gordon v. Street*, [1899] 2 Q. B. 641, C. A., where A. L. SMITH, L.J., at p. 648, lays stress on the fact that the plaintiff himself was thoroughly aware of the importance in his own interest of suppressing his identity, which fact tended to establish and confirm the view taken by the Court of Appeal, and the jury in the court below, that the plaintiff’s misrepresentations as to his personality were, as between the parties, material to the *inducement*; and *Whurr v. Devenish* (1904), 20 T. L. R. 385, where it was proved in evidence, to the satisfaction of Lord ALVERSTONE, C.J., that the defendant knew of the materiality of the representation made by him, at the sale of a horse by auction, that the horse was a private gentleman’s property (his own), and not that of a horse-dealer, and where it was further proved that a statement of that character to a buyer under the circumstances would tend to establish a belief in “the *bona fides* and genuineness of the sale,” and “yield better prices.” An analogous principle is applied to those cases in defamation where a secondary sense is sought to be imputed to the language used, and where the defamer’s knowledge of the special circumstances in virtue of which it would convey such extended or unnatural meaning to the particular person to whom the words were published, is not only a relevant, but an essential, fact: see Article 16 (4), and note (*m*) thereto, in the author’s *Code of the Law of Actionable Defamation*.

(*f*) See, generally, the cases cited in Chapters X, XI, and XII, *post*.

personality, identity, or status of any individual or as to the ownership of any property to which it relates, has been debated. Putting aside statements as to the position, credit, character, or business of one contemplated as the person with whom the representee is to contract, or whom he is to accept as his debtor, or to trust, or as to the personality of a proposed tenant or occupant of lands or premises, the subject of the contract induced by the misrepresentation (*g*), or as to the *personnel* of the directorate or management of a company or concern in which the representee is induced to take an interest,—all which are of manifest materiality (*h*), and come rather within the first class,—there are several examples in the books of representations as to personality which, though of no conceivable importance under ordinary circumstances, have, on proof of the knowledge by both parties of special circumstances, been held material. Thus, in the absence of any special circumstances, it is a matter of no concern to the vendor, or to the purchaser, of property, to know who is the particular individual for whom such property is to be bought, in the one case, or for whom it is being sold, in the other; but where it is known to the representor that, in fact, for whatever reason or caprice, the personality of the principal is so odious and objectionable to the representee that he would never enter into the contract if such personality were disclosed to him, then whether the “Dr. Fell” in question be a purchaser, or a vendor, any misrepresentation as to this matter becomes a material one (*i*). On the other hand, where it is not shown

(*g*) *Feret v. Hill* (1854), 15 C. B. 207, in which case it was held that a lease completed by actual possession could not be avoided, or treated as a nullity, though it had been induced by a fraudulent misrepresentation, but it was recognized that the statement as to the intended user of the premises for a perfumery business was a material one, which would have justified the representee in refusing to grant the lease, or give possession, in the first instance; *Canham v. Berry* (1855), 15 C. B. 597, where the plaintiff, knowing that the defendant could not assign the lease in question without his lessor’s consent, and would not, therefore, do so, unless one Morris, the intended occupant of the farm, was a responsible person, fraudulently stated that Morris answered this description, with the object and result of inducing the defendant to sell his leasehold interest, and it was held that this misrepresentation was not “collateral” (a very stupid expression, used in *Feret v. Hill*), or “foreign,” the term used by WILLIAMS, J. (see pp. 615, 621); in other words, it was material (*per* MAULE, J., at p. 616, who distinguished *Feret v. Hill*, at pp. 611, 612); *Cundy v. Lindsay* (1878), 3 App. Cas. 459, H. L., where the misrepresentation of the intended debtor and contractor as being the honest and solvent Blenkiron and Co. (whereas in truth it was a firm of the name of Blenkarn in the same street, which was dishonest and impecunious) was of obvious materiality; and *Morrison v. Robertson*, [1908] Sc. Ct. of Sess. Cas. 332, where the representor, a person whom the pursuer would not have trusted, stated himself to be the son, and the agent, of a person whom the pursuer did trust. Cp. the other cases of personation in the notes to Ch. III, Sect. 2, Sub-s. (2), *ante*.

(*h*) *Re Life Association of England, Blake’s Case* (1865), 34 Beav. 639, *per* ROMILLY, M.R., at p. 642; *Hallows v. Fernie* (1868), 3 Ch. App. 467; *Bevan v. Adams* (1870), 22 L. T. 795; *Re Scottish Petroleum Co., Anderson’s Case* (1881), 17 C. D. 373; *Re Same Co., MacLagan’s Case* (1882), 51 L. J. (Ch.) 841; *Re Same Co., Wallace’s Case* (1883), 23 C. D. 413, C. A.; *Smith v. Chadwick* (1884), 9 App. Cas. 187, H. L. (*per* LORD SELBORNE, L.C., at p. 190, and LORD BLACKBURN, at p. 194); and *Re Metropolitan Coal Consumers’ Association, Wainwright’s Case* (1890), 63 L. T. 429, C. A. Cp. the class of cases cited in the notes to § 291 in Ch. XI, Sect. 3, Sub-s. (4), where a misrepresentation of the status or position of a proposed transferee of shares in a company was held a material inducement to the directors to sanction the transfer.

(*i*) *Phillips v. Buckingham (Duke of)*, (1683), 1 Vern. 226; *Smith v. Wheatcroft*

clearly that the representee would not have entered into the contract on the same terms with any one else, and where the identity of the purchaser or vendor is neither of the essence of the contract, nor part of the consideration for it (*k*), or where it is not proved that the representor told any falsehood, but only that (not being under any duty to disclose the truth) he kept silence (*l*), no materiality is established. Again, under ordinary circumstances, if a man is willing to borrow money on certain terms, it is a matter of no moment whatever to him who the intended creditor is; but if it is known to the representor that the representee has (again, whether for good reason or bad, does not signify) such a horror or dislike of a particular person that he would not at any price incur any liability to him, and, knowing this, he suppresses and misrepresents the identity of the creditor so objected to, whether it be himself or another, the misstatement is material (*m*). Other representations which illustrate the subject under

(1878), 9 C. D. 223, where the principle was recognized by FRY, J., at p. 230, though the representee in that case did not bring himself within it; and *Archer v. Stone* (1898), 78 L. T. 34, *per* NORTH, J.

(*k*) *Fellowes v. Gwydyr* (Lord) (1829), 1 Russ. & M. 83, which was a case of a misrepresentation of the personality of a *vendor*, not a purchaser, and which took the form, not of a suppression of the identity of an unacceptable individual, but of a false allegation that the representor had a principal, and that this principal was Lord Gwydyr, a *persona grata* to the representee; whereas he had no principal, and had bought the Coronation fittings and decorations in question from Lord Gwydyr, and was reselling them at a profit, and Lord Gwydyr (so it was urged), if he had been the vendor, would not have entered into the transaction with any such commercial view, or allowed the representee to be a loser by it; here Lord LYNDEHURST, L.C., said that, if it had been shown that the representee would not have treated with any one but Lord Gwydyr, he would have been entitled to relief, but as this was not clearly made out, he was not; *Smith v. Wheatcroft, ubi sup.*, *per* FRY, J., who, at p. 230, after citing Pothier on the effect of *error personæ*, says: "I ask myself here whether the defendant has shown that any personal consideration entered into the contract. Has he shown that he would have been unwilling to enter into a contract on the same terms with any one else? I say distinctly that he has failed to produce any such effect on my mind, and, that being so, I think the second branch of the defence" (which was based on an alleged misrepresentation that the plaintiff was buying the land for his own use, and not for that of a certain colliery company) "fails, as well as the first."

(*l*) *Nash v. Dix* (1898), 78 L. T. 445, which was decided shortly after *Archer v. Stone, ubi sup.*, and by the same judge (NORTH, J.): the claim (specific performance by purchaser against vendor), and the defence (misrepresentation by the plaintiff that he was buying for himself, and not for a particular individual or class to whom the representee objected) was the same in both cases, but in *Nash v. Dix*, the plaintiff had not (as the plaintiff in *Archer v. Stone* had) told any falsehood whatever, for, though he knew that the defendant objected to sell to the Roman Catholics, and though he had entered into a contract to resell at a profit to persons of that faith, he was in a position to say with truth (as he did) that he was not buying for them, or as their agent, and there was no duty to reveal the intended and agreed resale.

(*m*) *Smith v. Kay* (1859), 7 H. L. C. 750, where it was urged that the representee would equally have been ready to execute the securities he did in favour of any one who would give him the terms to which he willingly became subject, and that it did not matter that Smith (the representor) bought up these securities, or how he became the owner of them, but the contention was rejected by Lord CHELMSFORD, L.C. (at pp. 758, 759), and Lord CRANWORTH (at pp. 769, 770); and *Gordon v. Street*, [1899] 2 Q. B. 641, C. A., where a notorious money-lender, "the hottest and bitterest" of his tribe, according to his own description of himself, had, by fraudulently misrepresenting and concealing his own identity under an alias or pseudonym, induced a necessitous person to borrow money of him on extortionate terms, which (as the representee alleged and proved) he would, to the representor's knowledge, never have

discussion are statements that a specified person is independent of other persons or influences, when in fact he is not so, or *vice versa* (n), and statements as to the ownership, or late ownership, of certain kinds of property,

consented to do, had he been aware that he was dealing with this particular usurer, and it was held that the misrepresentation was material *to the inducement*, if not to the contract,—*per* A. L. SMITH, L.J., who cites, at p. 646, *Smith v. Kay*, *ubi sup.*, and, at pp. 647–649, deals with *FRY*, J.'s, judgment, and the passage from Pothier referred to by him, in *Smith v. Wheatcroft*.—see note (k), *sup.*,—and shows how the same principles which justified *FRY*, J., in refusing the representee relief in that case required the Court of Appeal to grant it in the case before them. It was the object—by no means attained, unfortunately—of that ill-drafted measure, the Money Lenders Act, 1900 (63 & 64 Vict. c. 41) to render pseudonymity and anonymity impossible and illegal, in the case of a usurer, or, in other words, to make their registered representations as to their identity material by statute.

(n) *Felloves v. Gwydyr* (Lord), *ubi sup.*,—see note (k),—was the case of a man representing himself to be an agent of another, when in reality he was independent of him, being a purchaser from him. On the other hand, *Moens v. Heyworth* (1842), 10 M. & W. 147 (representation that goods had been “invoiced to sellers as of first shipping quality” by shippers having distinct and independent position, whereas they were agents or partners of the representors), *Smith v. Wheatcroft*, cited in note (k), *sup.*, *Archer v. Stone*, cited in note (i), *sup.*, and *Gordon v. Street*, cited in note (m), *sup.*, were cases of the converse type, *sc.* of statements by the representor of his separate individuality, when in fact he was identical with, or the agent of, another person. Here again, the Money Lenders Act, 1900, was *intended* to give statutory materiality to all such representations by usurers. A curious point, which should be noticed under this head, arose in *Angus v. Clifford*, [1891] 2 Ch. 449, C. A., where the question was mooted, though it became unnecessary to decide it, whether an express or implied statement as to a report of an expert being independent and disinterested, when in fact it was prepared at the instance and in the interests of a third person, is or is not, capable of being considered material, when there is no misrepresentation in the report itself. ROMER, J., whose view of the case rendered it incumbent on him to decide the point, held (pp. 456–458), that such a representation might be, and in that case was, most material, that is, to the inducement, and he instanced the cases of a valuation of a surveyor, or the opinion of a patent expert, as to which it might be most important for the representee to know whether it had been prepared on behalf of the vendor, or the purchaser, of the land or invention, or was independent of either. The Court of Appeal differed from ROMER, J., as to the meaning of the representation contained in the prospectus in that case, which, in their view, conveyed merely that the report referred to had been prepared “for the directors” in the sense of “for submission to the directors,” and not (as ROMER, J., had held) in the sense of “under the instructions of the directors,” in which case there had been no falsehood at all, and it was not necessary to express any decisive opinion as to the materiality of the representation on the construction put upon it in the court below; but LINDLEY, L.J. (pp. 468, 469), expressed some doubt on the point, though he was careful to preface his remarks by describing it as “a matter on which I do not intend to rest my judgment”; whilst BOWEN, L.J. (p. 475), said: “as to the materiality of the misrepresentation I will say nothing. It is a difficult point,” and KAY, L.J. (at p. 480): “I am not satisfied that *in this case* the statement is proved to be sufficiently material,” any more than, in his view, a statement that it was reported by a particular mining engineer a certain mine existed in a certain place, and the mine did exist there, though the report had not been made by the specified engineer, could be considered material; but, later, at p. 181, when dealing with the question of damage (which, for the purposes of that case, and his observations thereon, is not distinguishable in principle from the question of inducement), KAY, L.J., seems to realize that such a type of misrepresentation at least *might* be material: “I can quite conceive it might, by way of argument, be put in this way . . . ‘I should not have taken the shares at all if it had not been for this statement, and having taken the shares now, . . . damage has resulted to me,’” and he concludes, “I am not quite convinced in my own mind at present, and I will not give any decided opinion upon it, that there is a damage which results directly from the false statement.” It is submitted that the decision—for it was a decision—of ROMER, J., was quite sound, and that it has in no way been overruled by the faint expressions of doubt contained in the dicta—for they amounted to no more—of LINDLEY and KAY, LL.JJ.

such as horses, or pictures, and the like (*o*); all which representations, under the conditions above stated, but not otherwise, may be material. In such cases it is idle to urge that the representation was immaterial to the contract, because this presupposes that the contract has already been entered into, and so begs the question. The point is whether, but for the statement, the representee would have ever entered into the contract at all, or, in other words, whether the statement was material, not to the contract, but to the inducement (*p*).

130. Representations by an infant that he is of full age (*q*), or by a

(*o*) Generally speaking, the value of a picture gallery, library, stable, or collection of curios, is independent of the question who owns them, or has lately owned them, but is it well known by auctioneers and agents for sale that in many cases a representation that such property comes from private hands is a great inducement to purchase, and that the fact that a horse, or a collection, belongs to, or has come from, a dealer, would debar many persons from having anything to do with the sale. Here again it is a question of materiality, not to the contract, but to the inducement. "New lamps for old" is the ordinary desideratum, but there are many cases where, to the knowledge of the representor, "old lamps for new" is the inducement. The poems which Chatterton attributed to the mediæval priest were none the less works of genius because no Rowley wrote them, or existed; nevertheless his falsehoods were intended to be, and were, an inducement to others to buy them, and, if they had been known to be the work of the unknown Bristol boy, they would never have commanded even the small sale they had, or procured the temporary patronage of Walpole. Phædrus, with a similar, and afterwards avowed, intention to induce purchases of his Fables, attributed many of his own compositions to Æsop, "ut quidam artifices nostro faciunt sæculo, Qui pretium operibus majus inveniunt, novo Si marmori ascripserunt Praxitelen suo." Statements of the above character as to the ownership, or recent ownership, of "goods and chattels" generally, wines, pictures, or horses, have been considered material, as between the parties, in *Bezwilch v. Christie* (1776), Cowp. 395 ("sale of goods and effects of a gentleman deceased, at his house in the country, by order of the executors" was the announcement, which was untrue, and Lord MANSFIELD, C.J., described it as a fraud on the public, and mentions, by way of illustration, the then well-known case of the sale of "a gentleman's wines"—the reporter in a note gives his name as Bradshaw—"where large quantities had been sent in belonging to other persons, and all sold at a very high price, under an idea they were his. The consequence was, most of the buyers were taken in"), *Hill v. Gray* (1816), 1 Stark. 434 (where the only point correctly decided, or assumed, by Lord ELLENBOROUGH, C.J., was that a representation, if it had been made, that the pictures there being sold were being sold for Sir Felix Agar, might have been a material representation), *Arkwright v. Newbold* (1881), 17 C. D. 301, C. A. (where it was argued, at p. 314, that "if I am induced to buy a picture by the statement that it comes out of the gallery of some well known collector, I cannot recover damages on the ground that it did not, if the picture be worth what I gave for it," on which JAMES, L.J., at once observed: "that appears a dangerous doctrine. If I could repeat the observation as true, I could sell the picture for more"), and *Whurr v. Devenish* (1904), 20 T. L. R. 385 (a case of a sale of a horse, in which Lord ALVERSTONE, C.J., held that a false statement as to the horse being the property of the defendant, a private gentleman, whereas at the moment of the sale, it was owned by a jobmaster, was material, for it tended to induce a belief in the *bona fides* of the sale, and to fetch better prices). With the last case cp. *R. v. Kenrick* (1843), 5 Q. B. 49, where a representation to the same effect was held a false pretence.

(*p*) This point was insisted upon by A. L. SMITH, L.J., at pp. 645, 646, of *Gordon v. Street*, [1899] 2 Q. B. 641, C. A.

(*q*) This is one of the illustrations given of "false affirmations" on which an action for deceit will lie in Com. Dig. Action on the Case, A. 10. See *Johnson v. Pye* (1665), 1 Keb. 905, 913; *Cory v. Gertcken* (1816), 2 Madd. 40, 17 R. R. 180; *Overton v. Banister* (1844), 3 Hare, 503; *Nelson v. Stocker* (1859), 4 De G. & J. 458; *Re King, Ex parte The Unity Joint Stock Bank Association* (1858), 27 L. J. (Bankr.) 33; *Lemprière v. Lange* (1879), 12 C. D. 675; *Re Jones, Ex parte Jones* (1881), 18 C. D. 109, C. A.; and *Levene v. Brougham* (1909), 53 Sol. J. 243, C. A.

married woman that she is a *feme sole* or a widow (*r*), are of obvious materiality, when made to one who, to the representor's knowledge, would not advance money or give credit to, or contract with the representor, if believed by him to be under age, or married, as the case may be, though it is not always quite easy to determine in what form, and to what precise extent, relief can be given (*s*). This sort of materiality, however, belongs rather to the first of the two classes abovementioned, inasmuch as representations of the character indicated must necessarily be material in all ordinary commercial transactions, and do not require the existence of special conditions, and the representor's knowledge of such conditions, to make them so.

Sub-sect. (2). Burden of Proof, as regards Materiality.

131. From what has already been said, and the authorities generally on misrepresentation, it is quite clear that, unless expressly or impliedly admitted (as it very frequently is), materiality must be established by the representee (*t*) in addition to, and apart from, actual inducement (*u*). This burden is usually discharged by a comparison of the terms of the representation itself with the proved or admitted circumstances of the case. Where the statement, in relation to those circumstances, is alleged to disclose *ex facie* its own materiality, the matter is the subject of argument only, when once the circumstances are shown; but, in certain cases (*e.g.* where the representation is only an implied one, say, from the external appearance of an object) it may be necessary to produce some evidence of its tendency to deceive, which will not in all cases be presumed, as a matter of course, on the *res ipsa loquitur* theory (*x*).

(*r*) *Canham v. Farmer* (1849), 3 Exch. 169; *Vaughan v. Vanderstegen, Gates's Case* (1854), 2 Dr. 363; 100 R. R. 173; and *Same v. Same, Othwaite's case* (1854), 2 Dr. 408; 100 R. R. 199.

(*s*) Thus, whilst it was decided, or recognized, that relief might be given in equity in respect of misrepresentations of the character in question, either by way of rescission, or "making good," in most of the cases cited in the last two notes, and, further, in *Re King, Ex parte Unity Joint Stock Bank Association, sup.*, that they might support an estoppel;—it was held in *Johnson v. Pye, sup.*, at p. 905, that no relief could be given at law by way of damages ("the judgment will stay for ever, else the whole foundation of the common law will be shaken"); and in *Canham v. Farmer, sup.* (per PARKE, B., at p. 699), as to coverture, and *Levene v. Brougham, sup.*, as to infancy, it was held that no estoppel could be created by such representations.

(*t*) See, generally, the cases cited in this Section, and in notes to § 204 in Ch. X, Sect. 1, *post*.

(*u*) *Per* JESSEL, M.R., at p. 502, and Sir JAMES HANNEN at p. 504 of *Mathias v. Yettis* (1882), 46 L. T. 497, C. A.

(*x*) Thus, in *London General Omnibus Co. v. Lavell*, [1901] 1 Ch. 135, C. A., it was held that the judge was not entitled to infer a tendency to deceive from a mere inspection of the external appearance of the rival omnibuses, but that evidence was necessary to establish it. On the other hand, in the "hermaphrodite" case, and the "antique" case, cited in notes (*a*) and (*b*) to § 64, in Ch. III, Sect. 2, it was thought that the malformed animal, in the former, and the curio, in the latter, "told its own lie," and bore on its face the evidence of its capacity to induce and mislead.

SECT. 3. QUESTIONS OF LAW AND FACT IN RELATION TO INDUCEMENT AND MATERIALITY.

132. Both materiality and inducement are questions of fact, as stated below in Sub-sect. (1), but subject to certain preliminary considerations which may be matters of law, as explained in Sub-sect.(2). In the determination of any such issue of fact, the several matters mentioned in Sub-sect. (3) are to be borne in mind by the tribunal entrusted with this duty.

Sub-sect. (1). Inducement and Materiality when Questions of Fact.

133. That inducement, and also materiality, whenever either of them is put in issue, are *prima facie* questions of fact, may be gathered from all the cases generally which have been cited in the preceding part of this Chapter (y). Whether the representee was actually induced, cannot be inferred as a matter of law. In a case where, out of a large number of plaintiffs in an action based on misrepresentations in a prospectus, twelve did not appear at the trial, and afterwards appealed against the judgment which was necessarily given against them (the others, who did appear, having succeeded), the Court of Appeal had no alternative but to dismiss their appeal, Lord HALSBURY, L.C., observing that "it certainly is in the highest degree improbable that these plaintiffs did not see the prospectus, or that they were not influenced by the representation contained in it; but we are all of opinion that there is *no evidence of those facts upon which a court of justice can act*" (z). And it is no less well established that *prima facie* materiality is an issue of fact, to be left to the jury, if there is one (a), and to be found as a fact by the judge, if there is not (b); and where the judge has taken upon himself to withhold this issue from a

(y) See Article 19 (1) of the Code, and the authorities referred to in the notes to Sects. 1 and 2 of this chapter, and, particularly, *Andrews v. Mockford*, [1896] 1 Q. B. 372, C. A., at p. 374 (as to the questions left to the jury—see Questions 4 and 11).

(z) *Arnison v. Smith* (1888), 41 C. D. 348, C. A., at p. 374. The same high authority expressed himself in similar terms, in relation to a question of estoppel by representation, in *Bloomenthal v. Ford*, [1897] A. C. 156, H. L., at p. 162: "I entertain a doubt whether it is ever true, in a case where one person has been induced to act by the misrepresentation of another, that you can go beyond the *fact whether it is so, or not*. In arriving at a conclusion *upon this question of fact*, like every other question of fact, all the circumstances must be considered. A statement may be made so preposterous in its nature that nobody could believe that any one was misled."

(a) In *Flinn v. Headlam* (1829), 9 B. & C. 693, the question was left to the jury; and in *Andrews v. Mockford*, *ubi sup.*, it appears from p. 374 that, besides the two questions referred to in note (y), *sup.*, addressed to the issue of inducement, Lord RUSSELL, C.J., left to the jury the further question (Question 10) of materiality ("was it"—the telegram—"calculated to bring about the result that the plaintiff and others would buy shares in the market?"). In *Flinn v. Headlam*, *sup.*, the jury found that the representation was *not* material, and the court considered this finding so unreasonable that they ordered a new trial, but no one suggested that it was not a question for a jury to determine.

(b) In *Re Universal Non-Tariff Fire Insurance Co., Forbes & Co.'s Case* (1875), L. R. 19 Eq. 485 (see pp. 493, 494, 496), *Capel & Co. v. Sim's Ships Composition Co.* (1888), 58 L. T. 807 (see pp. 809, 810), and *Whurr v. Devenish* (1904), 20 T. L. R. 385, a judge, sitting without a jury, determined the issue of materiality *as a fact*.

jury, the conditions not being such as are described in the next Sub-section, he has been held to have usurped the functions of the jury, and a new trial has been ordered (c). In relation to marine insurance, this rule finds a place in the provisions of the statute which codifies the law on this subject (d).

134. Inducement and materiality are, as has been already observed (e), not only questions of fact, but *separate* questions of fact, requiring independent proof. Very frequently, it is true, the probability of inducement is so great, or, in other words, the materiality is so palpable, that actual inducement may be found with little, or even in some extreme cases, with no further evidence; just as, in cases of malicious prosecution, the absence of reasonable and probable cause may be so gross and glaring as to justify the further step of finding malice as an inference of fact from this circumstance alone. But, in the one class of the case as in the other, the two things are distinct issues. A theory, indeed, was prevalent in the earlier stages of the history of the law of misrepresentation—a theory which was the natural outcome of the law of evidence then existing (f), and which even in recent times, when such excuse had ceased to be admissible, received the embarrassing *imprimatur* of no less an authority than JESSEL, M.R. (g)—that from proved materiality the court is at liberty to infer actual inducement, *as matter of law*, without any evidence whatsoever. This heresy has now been effectually exploded, or explained away, by the highest authorities, who have placed beyond doubt that only in

(c) *Bevan v. Adams* (1870), 22 L. T. 795, where, the representation being that half the first issue of shares in a company had been subscribed for, which was taken to imply a further statement that the deposits had been paid, BEST, C.J., took upon himself to withdraw from the jury the question of whether the payment of the deposits was material or not, and to hold, as matter of law, that it *could not* be so. This was held to be wrong, and a new trial was ordered. On the other hand, in *Hill v. Gray* (1816), 1 Stark. 434, Lord ELLENBOROUGH, C.J., ignoring the jury, took upon himself to rule that the representation as to the ownership of the picture *was* material, and must have induced the representee, who was setting up the misrepresentation as a defence, and he non-suited the plaintiff accordingly. This ruling would of course at the present day be held quite impossible.

(d) See s. 20 (7) of the Marine Insurance Act, 1906 (6 Edw. 7, c. 41): “whether a particular representation be material or not is, in each case, a question of fact.”

(e) See § 114, *ante*.

(f) Before the passing of the Evidence Act, 1851 (14 & 15 Vict. c. 99), whereby (see s. 2) the parties in an action were for the first time allowed to give evidence, the representee obviously could not prove inducement as a fact otherwise than by evidence of materiality as a fact. It was natural, therefore, that in those days, the two issues should be confounded. Accordingly, whilst we find a great deal of discussion in the early authorities as to materiality, we find very little importance attached to inducement, except as involved in, and consequent upon, if not identical with, materiality. See the observations of Lord BLACKBURN on this point, cited *inf.* in note (h).

(g) The deliverance in question (which has necessitated so much subsequent explanation, with a view to showing that JESSEL, M.R., could not have meant what he appears to have said, or correction, on the assumption that he did) is to be found on p. 21 of *Redgrave v. Hurd* (1881), 20 C. D. 1, C. A.: “when a person makes a material representation to another to induce him to enter into a contract, and the other enters into that contract, it is not sufficient to say that the party to whom the representation was made does not prove that he entered into the contract relying upon the representation. If it is a material representation calculated to induce him to enter into the contract, it is an inference of law that he was induced by the representation to enter.

the rarest instances can such an inference be drawn at all, and that, when it is drawn, it is still an inference of *fact* (*h*), and has, even then, no further operation than to shift the burden from the shoulders of the representee to those of the representor; that is to say, that when once the former has established a case of obvious materiality, he may thereby have established at the same time a strong *prima facie* case of inducement also, such a case as makes it incumbent on the latter to prove the absence thereof (*i*), but not an irrebuttable case, which would be the corollary of any rule that the implication is one of law. And, even in such circumstances, the fact that the representee does not choose to go into the box, is some evidence tending to qualify the conclusion which might otherwise result from proof of palpable materiality, and ought to be taken into consideration from this point of view by the tribunal to whom it falls to adjudicate on the issue (*k*).

(*h*) *Smith v. Chadwick* (1882), 20 C. D. 27, C. A., where, at p. 44, JESSEL, M.R., states the rule correctly: "the inference" (sc. of fact—this is clear from what follows) "is, if he entered into the contract, that he acted on the inducement so held out; but even then you may show that in fact he did not so act;" *Mathias v. Yetts* (1882), 46 L. T. 497, C. A., per JESSEL, M.R., at p. 502 (who here again tacitly revokes his previous error), Sir JAMES HANNEN at p. 504, and LUSH, L.J., at p. 507; *Smith v. Chadwick* (1884), 9 App. Cas. 187, H. L., affirming the decision of the C. A. reported as above, where Lord BLACKBURN, at p. 196, says: "I do not think it is necessary . . . that the plaintiff always should be called as a witness to swear that he acted on the inducement. At the time when *Pasley v. Freeman* was decided, he could not be so called," and then, after referring to the language of JESSEL, M.R., in the Court of Appeal, as cited above, and approving it, he proceeds: "in *Redgrave v. Hurd*, the late Master of the Rolls is reported to have said that it was an inference of law"—(and not merely, as Lord BLACKBURN held it to be, "a fair inference of fact"). "If he really meant this, he retracts it in his observations in the present case. I think it is not possible to maintain that it is an inference of law. . . . I quite agree that, being a fair inference of fact, it forms evidence proper to be left to a jury that he was so induced"; *Smith v. Land and House Property Corporation* (1884), 28 C. D. 7, C. A., per BOWEN, L.J., at p. 16: "I cannot quite agree with the remark of the late Master of the Rolls in *Redgrave v. Hurd* that"—he then quotes the passage cited in the last note—"and I think that probably his Lordship hardly intended to go so far as that, though there may be strong reason for drawing such an inference, as an inference of fact"; *Hughes v. Twisden* (1886), 55 L. J. (CH.) 481, where, after discussing the above-cited authorities, and remarking that JESSEL, M.R., could not have meant what he is reported to have said in *Redgrave v. Hurd*, sums up as follows: "looking at all these cases . . . I come to the conclusion that it is not a presumption of law, but an important piece of evidence, from which, if there is nothing else, the court may draw the inference of fact that the plaintiff was induced by the statement to enter into the contract"; and *Arnison v. Smith* (1888), 41 C. D. 348, C.A., per Lord HALSBURY, L.C., at p. 369, where he endorses the statement of the law contained in the passages above cited from the judgment of JESSEL, M.R., in the Court of Appeal in *Smith v. Chadwick*, and not the statement made by him in *Redgrave v. Hurd*. For the application of the above principles to the statutory cause of action in relation to prospectuses, see Ch. XIII, Sect. 1, Sub-s. (4).

(*i*) See the passages cited in the last note from the judgment of NORTH, J., and Lord HALSBURY, L.C. In *Moss & Co. v. Swansea Corporation* (1910), 74 J. P. 351, CHANNELL, J., inferred inducement as a fact, though the plaintiff, when in the box, said nothing about it.

(*k*) Lord BLACKBURN, at p. 196 of *Smith v. Chadwick* (1884), 9 App. Cas. 187, H. L., almost immediately after the passage cited in note (*h*), *sup.*, proceeds: "but whenever that" (sc. the question what inference of fact ought to be drawn) "is a matter of doubt, I think the tribunal which has to elicit the fact should remember that now, and for some years past, the plaintiff can be called as a witness on his own behalf, and that if he is not so called, or, being so called, does not swear that he was induced, it adds much weight to the doubt whether the inference was a true one. I do not say it is conclusive."

Sub-sect. (2). What are Questions of Law in relation to Inducement and Materiality.

136. It is a question of law whether, in the ordinary course of events, or in the proved special circumstances of the individual case, the representation is *capable* of being construed as material: "it may be that the misstatement is . . . so trivial that the court will be of opinion that it *could not* have affected the plaintiff's mind at all, or induced him to enter into the contract" (l). In such cases—they must be of very rare occurrence—it is the duty of the court, on demurrer, or its modern equivalent, or at the trial, to rule accordingly, and withdraw the question from the jury (m). Similarly, in relation to the issue of inducement, as in the case of any other issue of fact, the question may at any time arise, whether there is any evidence thereof at all, or (where it has been *prima facie* proved by the representee) any evidence to the contrary; and these are questions of law.

Sub-sect. (3). Matters to be considered in determining the issues of Inducement and Materiality.

137. In determining, as a fact, whether any representation was of a nature to induce, or did actually induce, the representee to alter his position, "all the circumstances must be considered" (n). Amongst these circumstances are: the character of the document in which the representation is contained; the nature of the transaction, contract or business into which it is alleged that the representee was induced to enter; the kind of property passing by any contract of sale or mortgage; the profession, trade, skill, experience, or position in life of the representee; and the present and past relation of the parties to one another. Thus, as has been already noticed, a prospectus, or an advertisement after the modern flamboyant manner, will not be judged with the same severity, nor will so much literal accuracy be expected of it, as in the case of conditions of sale, for instance, or a formal instrument, or a business letter (o). Again, it has been considered, in prospectus cases, of the utmost importance that the representee "was a person well acquainted with dealings in shares of companies, with prospectuses, and Stock Exchange transactions," and, so, "not likely to look

(l) JESSEL, M.R., at pp. 45, 46, of *Smith v. Chadwick* (1882), 20 C. D. 27, C. A.

(m) In *Beachey v. Brown* (1860), E. B. & E. 796, an action for breach of promise of marriage, to which it was pleaded that the plaintiff had fraudulently concealed the fact of her engagement to a third person, a demurrer to the plea was allowed, on the ground that such a fact *could not* be material, as contradistinguished from facts as to a woman's chastity, or as to her circumstances and position in life, which clearly are material in such actions: see *Wharton v. Lewis* (1824), 1 C. & P. 529, and *Foot v. Hayne* (1824), 1 C. & P. 545. In *Gordon v. Street*, [1899] 2 Q. B. 641, C. A., the question whether the misrepresentation of the plaintiff's identity under cover of an assumed name was *capable* of being considered by any jury to be material, was debated as a question of law. See the observations of Lord HALSBURY, L.C., cited in note (z) to § 133, *sup.*, in reference to estoppel by representation.

(n) Lord HALSBURY, L.C., again, as cited in note (z) to § 133 *sup.*

(o) See § 50, *ante*, in Ch. II, Sect. 6, and the notes thereto.

upon a prospectus with more unquestioning faith than the rest of mankind" (p), or, "a man of business who had himself turned his own business into a company, and taken shares in other companies, and was quite competent to form an opinion for himself" (q), or a person with general and particular experience (as a broker) of company promotions and undertakings (r), or an underwriter, and not an investor, to which two classes of subscribers totally different considerations would appeal (s).

(p) DENMAN, J., at p. 577 of *Bellairs v. Tucker* (1884), 13 Q. B. D. 562; cp. *Stubbs v. Slater*, [1910] 1 Ch. 632, 642, C. A., where, in the case of one who professed to have been misled by the Stock Exchange term "net rate," notice was taken of his previous history as a speculator and gambler.

(q) Lord BLACKBURN, at p. 197 of *Smith v. Chadwick* (1884), 9 App. Cas. 187, H. L. (cp. Lord SELBORNE, L.C., at p. 190, who described the plaintiff as "an intelligent man of business, aware of the current prices at that time of bar and plate iron" (matters most relevant to the representation in that case, which related to the yield and profits of a business of this nature).

(r) KEKEWICH, J., at p. 809 of *Capel & Co. v. Sim's Ships Composition Co.* (1888), 58 L. T. 807. So in *Shrewsbury v. Blount* (1841), 2 M. & G. 475, TINDAL, C.J., at p. 504, drew attention to the fact that the plaintiff in that case, who claimed to have been deceived by the statement of a mining company as to its affairs. "was an attorney," and "that his knowledge of the world and experience must have taught him how little reliance is to be placed upon representations of such a nature."

(s) "The investor wants a sound concern: the underwriter wants an attractive prospectus"; per FARWELL, J., in *Baty v. Keswick* (1901), 85 L. T. 18. In other words, the ordinary applicant for shares is influenced by representations as to the inherent merits and business features of the undertaking, whereas the underwriter is comparatively indifferent as to these, and is concerned mainly with (as a modern financier pithily expressed it) "the front page of the prospectus," and the chances of the names appearing therein attracting at once (whatever happens afterwards) a response from the public sufficient to relieve him from liability, and secure his commission.

CHAPTER VII.

ALTERATION OF POSITION AND DAMAGE.

138. WHATEVER be the form of proceeding, or the nature of the relief sought, in respect of a misrepresentation, it is incumbent on the representee to establish that he was induced thereby, not to change his mind, in the sense of abandoning or adopting or varying a mere belief or opinion either on some general question or as to a particular individual or concern, but to *alter his position* in a manner affecting his material, temporal, or physical interests, as explained below.

SECT. 1. ALTERATION OF POSITION.

Sub-sect. (1). Meaning of the Expression.

139. The alteration of position may take the form of a contract or binding transaction with the representor himself, in which case the contract or transaction is the subject of either rescission or (if the representee elects, or is compelled to adhere to it) an action for damages, or it may consist in the entering into a contract or transaction with a third person, or in the doing of, or abstaining from, any act whatsoever which the representee is not compellable by law to do, or abstain from doing (*a*), in which latter event, the remedy is in damages only, and resultant damage therefore must be proved, as well as the act constituting the alteration of position (*b*), whereas, in any case in which avoidance only is sought, damage is wholly irrelevant (*c*). Therefore the first of the three rules enunciated by Lord HATHERLEY, then PAGE-WOOD, V.-C., and so often since approved and cited, though adequate to the subject-matter of the case before him, requires some qualification and explanation to make it acceptable as a proposition of universal application. It runs as follows: "every man must be held responsible for the consequences of a false representation made by him to another upon which that other acts, and, so acting, is injured or damnified" (*d*). As applied to the class of proceeding wherein

(*a*) See Article 20 of the Code. As to physical acts, such as using chattels or land, expressly or impliedly represented to be safe, § 145, *post*.

(*b*) See Sect. 2, *hereof*, *post*.

(*c*) See Ch. XI, Sect. 1, Sub-s. (3), *post*.

(*d*) *Burry v. Croskey* (1861), 2 J. & H. 1, at pp. 22, 23.

damage is the gist of the action—which was the case then before him—his statement is accurate, but not as applied to a claim to rescind. Again, “acting” must be understood as limited to acts having some bearing on the representee’s temporal interests (*e*); and, lastly, in an action of deceit, it is now the law that it is sufficient that the representee has *suffered* an alteration of position, producing physical injury, without having done any act at all (*f*).

140. It is quite clear that the alteration of position, whether pecuniary loss does, or does not, accompany it, must be a change in the business or practical affairs or condition of the representee. No misrepresentation can be actionable, *merely* because it has influenced another to join, or leave, a particular religious community, or political party, or social club (*g*), or to adopt, or abandon, philosophical or scientific tenets or doctrines. A lie told by a politician to the electorate, or by a candidate to a constituency, to secure voice, vote, or support, or the misstatement by a member of parliament to a committee as to the effect of a proposed clause in a Bill, in order to obtain its passage or amendment (*h*), or the retailing of myths, whether for evil purposes, or (like Plato’s *γενναῖον ψεύδος*) for good, can never be “damageable” (to use an old phrase), or otherwise the subject of proceedings at the instance of the person deceived, if nothing more results than that the representee’s mind is seduced or befooled, or that he is rendered ridiculous, whatever may be the judgment to be passed on such falsehoods *in foro conscientie* (*i*).

Sub-sect. (2). Classes of Contracts and Transactions which may constitute Alteration of Position.

141. The entering into a contract either with the representor himself (*k*), or with a third person (*l*), or class of persons (*m*), are the two most common and obvious types of what is understood by alteration of position. But there are also other relations, involving liability present or contingent, which the representee may be induced to assume, and which, though not amounting in strictness to contracts, nevertheless constitute an alteration in his position, in respect of which he has a right to maintain an

(*e*) See § 140, *inf*.

(*f*) See § 145, *post*.

(*g*) In *Chamberlain v. Boyd* (1883), 11 Q. B. D. 407, C. A., it was considered that the loss of a chance of being elected to a club was not temporal damage sufficient to render actionable a slander which was not so otherwise.

(*h*) The late Mr. Parnell, in his evidence before the Parnell Commission, admitted, or rather avowed, that he had made statements in the House of Commons with the deliberate intention of deceiving his fellow-members. It is quite common now for rival statesmen to charge one another with “frauds on the electorate,” “fraudulent trusteeship of power,” and the like: but no one has suggested that these deceptions, degraded and degrading as they are, could be made the subject of civil proceedings.

(*i*) On the moral significance of these types of misrepresentation, see App. B, Sect. 2.

(*k*) For this class of case, see Ch. XI, *post*.

(*l*) See Ch. X, Sect. 1, *post*, for illustrations of this type, and, particularly, *Skidmore v. Bradford* (1869), L. R. 8 Eq. 134 (where the representee was induced to contract with a third person to purchase his warehouse). And see generally the misrepresentation of authority cases referred to in Ch. IX, Sect. 3, Sub-s. (2).

(*m*) *Barry v. Croskey*, *ubi. sup*.

action. These it will be convenient to call “ transactions ” (*n*). They include such unilateral acts as gifts (*o*), licenses and consents (*p*), forbearances (*q*), and renunciations (*r*), and also acts, of whatever kind, the effect of which is to render the representee civilly responsible to some third person (*s*), including, perhaps, even an act which renders him amenable to the criminal law, if it would not have done so on the assumption of the truth of the statement on the faith of which he committed it (*t*).

Sub-sect. (3). Burden of Proof and Questions of Law and Fact.

142. The onus is on the representee to allege and prove the particular mode in which his position was altered, and that the representor, actually or presumptively, intended him to act upon the representation in that manner, and that he did so act; and it is not sufficient to prove even that damage was caused to the representee unless it came through the medium of an alteration of position induced by the misrepresentation (*u*). Whether

(*n*) See the definition of this term in Article 20 of the Code.

(*o*) *Haygarth v. Wearing* (1871), L. R. 12 Eq. 320, *per* WICKENS, V.-C., at p. 329, in setting aside a sale induced by fraudulent misrepresentation (“ the same conclusion would, I conceive, have resulted from the same view of the evidence in other respects, if I had held that the true transaction was intended as substantially a gift by Miss Haygarth, and not a sale; for . . . I conceive that the evidence could not support a gift obtained from Miss Haygarth on the footing of certain representations, without showing those representations to be true ”); and *Re Glubb*, [1900] 1 Ch. 354, C. A., where it was held that a gift can be recovered by the donor, on discovery of the true facts, from a donee who had innocently misrepresented them.

(*p*) As to consents to judgments, see Ch. XIV, Sect. 1, Sub-s. (1), *post*.

(*q*) *Firbank's Executors v. Humphreys* (1886), 18 Q. B. D. 54, C. A., where the deceased was induced to continue carrying out his contract with the railway company without pressing for cash, which he otherwise would have done: *per* LINDLEY, L.J., at p. 61.

(*r*) *McCarthy v. Decaix* (1831), 2 Russ. & M. 614 (*per* Lord BROUGHAM, L.C., at pp. 620–623; a case of renunciation of marital rights). Releases by deed and compromises, of course, fall within the class of contracts proper: see *Hirschfield v. London, Brighton, and South Coast Railway Co.* (1876), 2 Q. B. D. 1, and *Gilbert v. Endean* (1878), 9 C. D. 279, C. A., and compare the cases of rescission of deeds of compromise and settlement cited in the notes in Ch. XI, Sect. 3, Sub-s. (1), *post*.

(*s*) See *Adamson v. Jervis* (1827), 4 Bing. 66, where the representee, an auctioneer, was induced to sell certain goods, whereby he rendered himself liable to the true owner; and *Eyre v. Smith* (1877), 2 C. P. D. 435, where the “ transaction ” was a resolution to liquidate the affairs of a bankrupt by arrangement under the old bankruptcy law. (*p*. also the cases of registration of transfers of shares cited in the notes to § 291, *post*.)

(*t*) *Burrows v. Rhodes*, [1899] 1 Q. B. 816, Div. Ct., where one of the matters complained of in the statement of claim, which was held to have been well pleaded, was that the plaintiff had been taken prisoner by the South African Republic, and was liable to summary execution in that State, and also to severe punishment in England, and where the objection that he was suing in respect of a criminal act was overruled, inasmuch as, if the representation on which he so acted as to incur criminal liability had been true, it would not have been a criminal act.

(*u*) See the cases, generally, which are cited in this Chapter, and, particularly, *Tallerman v. Dowling Radiant Heat Co.*, [1900] 1 Ch. 1, where STIRLING, J., dismissed the action, because, though damage was caused to the plaintiff by misrepresentations alleged to constitute a “ passing off,” yet “ the statements complained of were not intended to be acted on by the plaintiffs, and have not been acted upon by them ” (pp. 5, 6). Where it is a case of suffering an alteration of position, of course no act need be averred or proved, but only the consequences which the representee had to endure, and the damage caused thereby; as to which, see § 145, *post*. The same burden of

there is any sufficient averment (*x*), or proof (*y*), of such matters, fit to be left to the jury, is a question of law. Subject to the above, and subject also to the principle of law that a man is presumed to intend the natural consequences of his acts and statements, all matters connected with alteration of position are issues of fact (*z*).

SECT. 2. DAMAGE.

143. Where the representee elects, or is compelled, to affirm a contract with the representor which he was induced to enter into by misrepresentation, or where his alteration of position consisted in some act or result other than the entering into a contract, and as to which therefore no question of either avoidance or affirmance can arise, it is essential to prove not only that he acted on, or suffered in consequence of, his belief in the truth of the representation, but that such action or suffering resulted in damage cognizable by the law (*a*). It is of no more use in such cases to prove alteration of position without damage, than (as has already been seen) it is sufficient to prove damage without alteration of position.

Sub-sect. (1). What constitutes Actionable Damage.

144. The only damage of which the law takes cognizance, in an action for misrepresentation, is actual and temporal damage—that is, some loss either of money or money's worth, or some physical injury, capable of being pecuniarily compensated, or some present or contingent liability, or tangible detriment, which admits of being quantified and assessed. Such damage does not include mere mental distress, or the mere loss of social advantages to which no money value can be attached (*b*); and there is no such thing, in proceedings of the nature in question, as the presumptive damage which the law takes notice of in certain classes of action, such as defamation.

145. Damage of the nature indicated may consist, firstly, in entering into or carrying out a contract or transaction which involves pecuniary

proof is incumbent on a party setting up estoppel by representation: see Lord Halsbury's *Laws of England*, title "Estoppel," vol. xiii, p. 384. Cp. the like rule in Roman law: see App. C, Sect. 2, Sub-s. (7).

(*x*) In *Behn v. Kemble* (1859), 7 C. B. (N. S.) 260, the third count of the declaration did not allege either any intention on the part of the representor that the representee should act on the representation, or that the representee did so act: it was accordingly held bad. So also, in the more modern case of *Salaman v. Warner* (1891), 65 L. T. 132, C. A., the statement of claim was struck out on the ground (amongst others) that no such averments appeared in it.

(*y*) See the cases cited in this Chapter, generally.

(*z*) See the same authorities, and also those cited, in Ch. VI, Sect. 1, *ante*.

(*a*) This is Article 21 of the Code, *q.v.* As to when a representee is compelled in law by certain circumstances to adhere to a contract with the representor which otherwise he might have rescinded, see Ch. XI, Sect. 4, Sub-ss. (4), (5), and (6).

(*b*) See *Chamberlain v. Boyd* (1883), 11 Q. B. D. 407, C. A., a case of slander not actionable except upon proof of actual temporal damage, and which therefore is in point, where it was held that the loss of a chance of admission to a social club did not amount to such damage.

injury to the extent of the difference between what is paid and payable thereunder and the lesser value—if it be lesser—of what is received and receivable (c), or it may take the form of payments to a third person, or to the representor himself (d), or loss of profits, appointments, or earnings (e), or trouble and expense, or detriment of any kind to which a money value can be attached (f). Secondly, as in the “trap” and “invitation” cases, which are usually dealt with under the head of negligence, though, it is conceived that, with equal, if not greater, propriety, they may be said to be founded on fraudulent misrepresentation by conduct (g), the

(c) See Ch. X, Sect. 3, *post*, as the rules for the quantification of the damage. The present Section is concerned only with the constituent elements of damage.

(d) Moneys paid to the representor himself are usually sued for in the form of an action for money had and received: but they may be regarded as damages, and none the less because the amount is liquidated: see *Kettlewell v. Refuge Assurance Co.*, [1908] 1 K. B. 545, C. A., *per* Lord ALVERSTONE, C.J., at p. 550.

(e) *Barley v. Walford* (1846), 9 Q. B. 147 (loss of profits on a design for silk handkerchiefs), *Denton v. G. N. Ry. Co.* (1856), 5 E. & B. 860 (missing an appointment), and *Burrows v. Rhodes*, [1899] 1 Q. B. 816, Div. Ct. (loss of pay and earnings and capacity to earn).

(f) In *Barley v. Walford*, *sup.*, besides his loss of profits, the plaintiff was put to the trouble and expense of making inquiries, and communicating with the parties who had been falsely stated by the defendant to be the registered owners of the design, and to have the intention of prosecuting the plaintiff. In *Milne v. Marwood* (1855), 15 C. B. 778, the plaintiff was put to the expense of fitting up the ship, which had been misrepresented to be sound, for a voyage to Australia. In *Richardson v. Sylvester* (1873), L. R. 9 Q. B. 34, the plaintiff spent money and time in going to see the farm advertised. In *Wilkinson v. Downton*, [1897] 2 Q. B. 57, apart from the physical injuries mentioned below in note (i), the plaintiff paid the railway fares of certain persons whom she sent to see after her husband, and WRIGHT, J., held that there could be no question as to her right to recover this sum as damage (p. 58). In *Burrows v. Rhodes*, *sup.*, amongst other heads of damage claimed was the expense of seven surgical operations which the plaintiff had to undergo. In *Pritty v. Child*, [1902] 71 L. J. (κ. B.) 512, Div. Ct., the plaintiff claimed and recovered the expense of sinking a well on the spot indicated by the “water-finder.” As to other kinds of detriment, see *Mullett v. Mason* (1866), L. R. 1 C. P. 559, where the plaintiff recovered the value not only of the diseased cow which had been fraudulently misrepresented as sound, but of five others with which it was placed, and which also died of the disease. Cp. *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256, C. A., where it was held that the mere trouble of sniffing the smoke-ball at the stated intervals was sufficient “detriment or inconvenience” to constitute a consideration for the contract sued upon (*per* LINDLEY, L.J., at pp. 264, 265, and BOWEN, L.J., at p. 271), and, for the same reason, the same trouble and inconvenience would, no doubt, in an action of misrepresentation or any other tort, constitute legal damage, sufficient to support the action, however exiguous the pecuniary value of that damage might be.

(g) All the elements of fraudulent misrepresentation are present in this type of case. By his conduct in “setting the trap,” that is, in leaving the dangerous cavity unfenced, unlighted, and unwarned against, or by pulling up the train short of, or past, the platform (to take the common examples), the party, silently but none the less effectually, represents that the place is safe, that there is no hole, or that there is no danger in alighting. This is a statement by conduct, as it was expressly put by Lord CAIRNS, L.C., at p. 15 of *North Eastern Railway Co. v. Wainless* (1874), L. R. 7 H. L. 12: “it appears to me that the circumstance that the gates at this level crossing were open at this particular time, amounted to a statement, and a notice to the public, that the line at that time was safe for crossing.” It appears, further, from all the negligence cases of this description,—see particularly *Clarke v. Army and Navy Co-operative Society*, [1903] 1 K. B. 155, C. A., *per* COLLINS, M.R., at pp. 164, 165, and ROMER, L.J., at p. 166,—that when, and only when, such an implied statement is not merely false, but made with a knowledge of its falsity,—which is precisely what the law means by fraudulent (see Ch. V, Sect. 1),—it is the subject of an action for damages

damage may consist in doing an act which results in personal and physical injury (*h*). Thirdly, it has been decided, quite in accordance with the principles of the law of misrepresentation (though WRIGHT, J., seemed to doubt whether he was not extending them), that if a fraudulent misrepresentation is made by one to another, which that other is intended to, and does, believe to be true, and which is of a nature to cause not merely mental distress, but also consequent physical injury in a normal person so believing, then, though the representee *does* nothing on the faith of it, but only endures something, the pecuniary equivalent for the bodily suffering is damage of which the court must take notice in an action based on such misrepresentation (*i*). Mere “moral and intellectual” damage—that is,

at the suit of any person who acted on the faith of its being true, unless he knew *alimidi* of the danger, which knowledge again,—see (Ch. X, Sect. 2, Sub-s. (1)),—is a good affirmation plea to an action of deceit, because the plaintiff is thereby shown not to have been deceived, or “entrapped.” In *Blakemore v. Bristol and Exeter Railway Co.* (1858), 8 E. & B. 1035, the plaintiff, though alleging in his declaration, and at the trial, that the defendants, by placing a crane in a certain spot, “professed to the public” that it was intended to, and might safely be, used by consignees of goods, did not go on to aver, or attempt to prove, that such “profession” was more than a contract, or the assumption of a duty, or that it was a representation in the legal sense of the word (see Ch. 11), much less that it was fraudulent; and on this ground it was held that COLERIDGE, J., was right in non-suiting the plaintiff. The whole of the judgments are based on the hypothesis that the action was capable of being maintained as one of deceit, as well as one of negligence: but then, as the former was not the cause of action put forward, and the latter was not proved, the plaintiff failed. See the observations on this case contained in the judgment delivered by COTTON, L.J. (for himself and BOWEN, L.J.) at p. 516 of *Heaven v. Pender* (1883), 11 Q. B. D. 503, C. A. Note that *Baily v. Merrell* (1615), 3 Bulstr. 94, which was a case of negligence, and nothing else, as ordinarily understood, is usually cited as a case of misrepresentation. See § 449, *post*.

(*h*) Illustrations of physical injury resulting from the act of using a chattel, or real property, the qualities or condition of which had been *expressly* misrepresented are: *Langridge v. Levy* (1838), 4 M. & W. 337, Exch. Ch.; *Longmeid v. Holliday* (1851), 6 Exch. 761 (where, however, the plaintiff failed, because the representation was not deemed to have been made to him); and *Burtsal v. Bianchi* (1892), 65 L. T. 678 (where the plaintiff claimed in respect of the illness caused by his taking a house with defective drains on the faith of a representation by the defendant that they were in good order, but, it not being proved that the representation was fraudulent, as well as false, the action failed). In a curious case of *Southern v. How* (1617), Cro. Jac. 468; Poph. 143; 2 Rolle Rep. 26, the defendant delivered a stone, stating it to be a genuine jewel, to the plaintiff, a factor, for delivery to the King of Barbary. The plaintiff proceeded to Barbary, and delivered the stone to the king, who, however, declared it to be counterfeit, and promptly arrested and imprisoned the plaintiff, who sued the defendant for damages for deceit. The court was “inclined to be against” the plaintiff, because it did not clearly appear that the defendant knew that the stone was not genuine, and the suit did not proceed further: but, if it had, the damages presumably would have included a sum to compensate the plaintiff for his imprisonment.

(*i*) *Wilkinson v. Downton*, [1897] 2 Q. B. 57, where (see the preliminary statement of the facts by WRIGHT, J., at p. 58) “the defendant, in the execution of what he seems to have regarded as a practical joke, represented to the plaintiff that he was charged by the husband with a message to her to the effect that her husband was smashed up in an accident, and was lying at the Elms at Leytonstone with both legs broken, and that she was to go at once in a cab with two pillows to fetch him home. All this was false. The effect of the statement on the plaintiff was a violent shock to her nervous system, producing vomiting and other more serious and permanent physical consequences, at one time threatening her reason, and entailing weeks of suffering and incapacity to her as well as expense to her husband for medical attendance.” At the trial before WRIGHT, J., and a jury, the plaintiff was awarded, as damages, the separate sum of 1s. 10½d., being the sum she had paid for the railway fares of persons sent by her to see after her husband, and £100 for the above physical

personal distress of mind, unaccompanied by physical effects—will not do (*k*).

146. The above being the *nature* of the damage which is required to be established, where damage is a necessary ingredient in the cause of action, it remains to examine what relation between the misrepresentation and the damage is necessary and sufficient to render such misrepresentation actionable in this respect. The relation obviously must be a causal one, and not one of mere succession or sequence. The *propter hoc* as well as the *post hoc* must be proved. It is not enough to show that damage followed,

injuries. WRIGHT, J., reserved the question of the plaintiff's right to retain the verdict, and, on further consideration, decided it in her favour, holding that the amount of the smaller sum was clearly within the principle of the decided cases, but he expressed some doubt (pp. 58, 59) whether the £100 came within that doctrine, "the real ground of which appears to be that a person who makes a false statement intended to be acted on must make good the damages naturally resulting from its being acted on," and he adds: "here there were no injuries of that kind," by which he must mean that *quoad* the claim for physical injuries, the plaintiff suffered damage directly, and not through the medium of a voluntary act which produced the damage. But, in each of the two cases, the damage is caused by the representee's belief in the truth of the knowingly false statement, which would seem to bring both of them within the single principle that where damage and fraud concur, there is a cause of action. It can make no difference that, in the one case there was an intermediate link in the chain of causation, and in the other, there was none. Indeed, of the two, the latter result would appear to be the more actionable, if anything. It was not necessary, therefore, to revert, as WRIGHT, J., did, for the purpose of sustaining the verdict, to "another ground," which he states as follows, at pp. 58, 59: "the plaintiff has . . . wilfully done an act calculated to cause physical harm to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. This proposition without more appears to me to state a good cause of action, there being no justification alleged for the act." All this is true enough, but the proposition would equally apply to any tort resulting in physical injury. It does not state "another ground," but a generic principle, in which the ground of fraudulent misrepresentation is included; and, when, in order to specify the cause of action, the necessary inquiry is made as to the nature of "the act, calculated to cause physical harm to the plaintiff," which the defendant did, the only answer must be "making a statement which he knew to be false," or, in legal phraseology, fraudulent misrepresentation. The decision in the above case would bring within the scope of actionable misrepresentations the kind of lies which play so prominent a part in drama and fiction, as to the death, arrest, conviction, engagement, or marriage of a person in whom the representee is interested. Cf. the incident in Mr. Eden Phillpott's *Dagger Farm*, where a falsehood of this character is told to a young girl for the purpose, and with the result, of destroying her reason.

(*k*) The judgment of WRIGHT, J., at pp. 58–61 of the case last cited is occupied with an examination of the question whether illness resulting from fright, or shock, can be considered to come within the description of physical injury at all, a question which was answered by him in the affirmative for the purpose of that case at any rate, and, afterwards for all purposes, in *Dulien v. White*, [1901] 2 K. B. 669 (see the very interesting and philosophical judgments of KENNEDY, J., and PHILLIMORE, J., who, though agreeing in the result, arrive at it by somewhat different trains of reasoning). Mere "moral and intellectual" damage of course will not do: as Lord WENSLEYDALE said at p. 598 of *Lynch v. Knight* (1861), 9 H. L. C. 577, "mental pain or anxiety the law cannot value, and does not pretend to redress, when the wrongful act complained of causes that alone, though when a material damage occurs and is connected with it," it is otherwise. Iago, when he "ensnared the body and soul" of Othello by his lies, might have been responsible to Othello for fraudulent misrepresentation, in so far as it produced injury to his body (for instance, the epileptic seizure in Act IV, Sc. 1), but not for mere distress of "soul." So, too, the idiots who shout "fire" in a theatre or public place, or give false alarms to fire stations, or cry false news, would be liable for physical injury caused by crushing, or shock (see, as to the criminal aspect of such acts, the statutes referred to in Ch. XIII, Sect. 3), but not for mere agitation and fright.

or even that it was caused by, the misrepresentation, unless it was of such a nature that the representor did in fact, or (if he had thought of the matter at all) could not have failed to, contemplate it as the, or a, probable result. The rule may be expressed in two ways, accordingly as causality, or intention, is taken as the standard. On the one hand, it is correct to say that the damage must be shown to have been the natural and probable, or else the actually intended, result of the misrepresentation being believed and acted upon, or (in the case of physical suffering) being believed. On the other hand, it is equally correct, and comes to the same thing, to say that the damage must be shown to have been intended, actually or presumptively, and that a representor is presumed to have intended the natural and probable consequences of his misrepresentation, that is to say, the consequences which he actually foresaw, or which he ought to have foreseen, as likely to ensue, either in the ordinary course of events, or in the special circumstances of the case. One of two things, therefore, must always be established: either a necessary, or at least natural, relation of causality between the two events or facts, or else an actually intended connection (*l*). Unless such a connection is made out, the representee, though he may prove that he did in fact sustain the damage alleged by reason of his belief in the truth of the representation, must fail (*m*); when it is made out, he succeeds (*n*). Of course, whenever the representee is in a

(*l*) Cp. what was said by Lord DENMAN, C.J., delivering the judgment of the Court of Queen's Bench, at p. 209 of *Barley v. Walford* (1846), 9 Q. B. 197, in a passage cited in note (*d*) to § 118, *ante*, in relation to the question of inducement, to which it is equally relevant: "it is not true to say that any false statement which produces damage is actionable; for, if every untrue statement which produces damage to another would found an action at law, a man might sue his neighbour for having a conspicuous clock too slow."

(*m*) *Collins v. Cave* (1860), 6 H. & N. 131, Exch. Ch., *per* WIGHTMAN, J., at p. 134 ("the difficulty is to say that the damage necessarily resulted from the fraudulent misrepresentation"); *Barry v. Croskey* (1861), 2 J. & H. 1 (demurrer allowed); *Dashwood v. Jermyn* (1879), 12 C. D. 776; *Angus v. Clifford*, [1891] 2 Ch. 449, C. A., where KAY, L.J., at pp. 480, 481, expressed a doubt whether the damage alleged was sufficiently made out, though the decision in favour of the defendants proceeded on other grounds; and *Ajello v. Worsley*, [1898] 1 Ch. 274, *per* STIRLING, J., at pp. 281-283. A good example of the absence of a natural causal connection is put, in the course of the argument, by PAGE-WOOD, V.-C., in *Barry v. Croskey*, *sup.*, at pp. 18, 19: "Your argument," he observes, addressing counsel for the plaintiffs, and referring to *R. v. De Berenger* (1814), 3 M. & S. 67, "would show that every person who, in consequence of De Berenger's frauds upon the Stock Exchange, was induced to purchase shares at an advanced price, in reliance upon the false rumours he had circulated that peace was concluded, was entitled to maintain an action against De Berenger for the increase in price. Would not such consequences be too remote to form ground for an action?" These observations were approved and applied by Lord CAIRNS, at pp. 412, 413, of *Peek v. Gurney* (1873), L. R. 6 H. L. 377, and approved in, but held inapplicable to the circumstances of, *Andrews v. Mockford*, [1896] 1 Q. B. 372, C. A., by A. L. SMITH, L.J., at p. 381, and RIGBY, L.J., at pp. 384, 385, and (as appears from p. 385) by Lord RUSSELL, C.J., at the trial.

(*n*) As in *Polhill v. Walter* (1832), 3 B. & Ad. 114, a case of misrepresentation of authority to accept a bill of exchange, where Lord TENTERDEN, C.J., delivering the judgment of the King's Bench, said, at pp. 123, 124: "the defendant must be taken to have intended that all such persons" (sc. "all to whom the bill may be offered in the course of circulation") "should give credit to the acceptance, and then act upon the faith of that representation, because that, in the ordinary course of business, is its natural and necessary result"; *Barley v. Walford*, *sup.*, *per* Cur., at pp. 206-209; *Mullett v.*

position to allege and prove that the representor in fact intended the precise kind of damage which resulted, the question of whether such damage was the probable result of the misrepresentation, which is only of importance when the plaintiff is compelled to resort to the theory of *presumed* intention, becomes wholly immaterial (o).

147. In connection with this question of causality, not a few inaccurate propositions have crept into the text-books, and into judgments otherwise of great authority: such, for instance, as (1) the supposed rule that "remote" damage is not recoverable, but only "proximate" or "immediate" or "direct" damage; (2) that more direct causality must be established where the damage is occasioned to a third person than when it is sustained by the representee himself; and (3) that less direct causality need be proved in a case of fraudulent misrepresentation, than in any other case of tort. It is proposed to discuss these in order.

148. The origin of the first of the above inexact and unphilosophical statements of the law is to be found in the ridiculous rule, *in jure proxima causa, non remota, spectatur*, which would seem to imply that remoteness, of itself, is sufficient to negative the possibility of causation, and in the construction put upon that rule by Bacon, in the constantly quoted passage: "it were infinite for the law to judge the causes of causes, and their impulsions one of another: therefore it contenteth itself with the immediate cause; and judgeth of acts by that, without looking to any further degree" (p). But, if a repetition of language used by the author elsewhere (q) may be permitted, "it is just this which the law has to consider. It is not a question of remoteness and proximity, but of causation or non-causation. If the act in question is a link in the chain, it does not

Mason, cited in note (f) in § 145, *ante*; and *Wilkinson v. Downton*, *sup.*, per WRIGHT, J., at p. 59 ("it is difficult to imagine that such a statement, made suddenly and with apparent seriousness, could fail to produce grave effects under the circumstances upon any but an exceptionally indifferent person, and therefore an intention to produce such an effect must be imputed, and it is no answer in law to say that more harm was done than was anticipated, for that is commonly the case with all wrongs.")

(o) In *Milne v. Marwood* (1855), 15 C. B. 778, where the plaintiff (unnecessarily, perhaps) had averred that the defendant actually intended him to incur the expense which he did in fitting up for a voyage to Australia the vessel which had fraudulently been represented to be sound, WILLIAMS, J., at pp. 781, 782, and MAULE, J., at p. 783, doubting whether this was "general" damage, that is, damage flowing in the ordinary course of events from the wrong, thought that there should be a new trial to clear up the point, which the first jury may not have had in their minds, whether, as pleaded, such damage had in fact been intended; but in *Andrews v. Mockford*, [1896] 1 Q. B. 372, C. A., it was held that there was abundant evidence of the alleged actual intention of the defendants, by their fabricated and published telegram, not only to strengthen the effect of the fraudulent prospectus, which was addressed of course only to possible allottees, but also to cause the public to purchase shares in the market, and to sustain the precise damages which they did; and, whilst recognizing, in accordance with Lord HATHERLEY's observations cited in note (m), *sup.*, that this result was not the natural and probable one in ordinary circumstances, the Court of Appeal was of opinion that the circumstances of that case disclosed an intention in fact on the part of the defendants to produce it, which rendered it unnecessary to consider whether such intention could otherwise have been imputed to them.

(p) See *Mazims of Law*, Reg. 1, and Bacon's commentary thereon, in vol. vii, pp. 327-330 of his *Collected Works* (ed. Spedding, Ellis, & Heath).

(q) *Code of the Law of Actionable Defamation*, App. V, Sect. 3.

signify how many links divide it from the termini, or how long the chain is. If it is not, then it is equally immaterial how near it may be in time or in space, to any link in the chain." The only relevant questions are (1) whether the misrepresentation in fact caused the damage, and (2) whether it was of such a nature as to render it antecedently probable that such damage would result therefrom, and it is obvious that a representee may bring his case within both these conditions, without establishing a "proximate," or, to use the language of Lord HATHERLEY (*r*), an "immediate" connection between the two things, and equally that he may fail to satisfy such conditions, though the connection may be not in the least remote, but "proximate," or even "immediate." It is true that, so far, no great harm has been done by the loose terminology in question, because all lawyers by the expression "too remote," as applied to damage, understand damage which is not the natural and probable result of the wrong, and by the terms "proximate" or "immediate," a damage which is (*s*). But inexact and unscientific expressions tend to promote looseness of analysis, and at any moment (as has happened already in the case of such expressions as "malice," "fraud," "making good," "privilege," "fair comment," "warranty," etc.) may encourage heretical views as to the substance, and not merely the form, of the law.

149. The second mistake (as it is conceived to be) which is above referred to, finds its source in the two propositions which Lord HATHERLEY (then PAGE-WOOD, V.C.) added to the primary rule enunciated by him,—a rule which, if confined to an action for damages, is sound enough. The first proposition, which relates to injury caused to the immediate representee, has already been quoted (*t*). The two others, which relate to cases where the damage is sustained by a third person to whom the representation is intended to be communicated, and who (see Chapter VIII. Sect. 2) is, in that sense, also a representee, though not an immediate one, are as follows. "Secondly, every man must be held responsible for the consequences of a false representation upon which a third person acts, and, so acting, is injured or damnified, provided it appears that such false representation was made with the intent that it should be acted upon by that third person in the manner that occasions the injury or loss. But, thirdly, to bring it within the principle, the injury, I apprehend, must be the immediate, and not the remote, consequence of the representation thus made. To render a man responsible for the consequences of a false representation made by him to another, upon which a third person acts, and

(*r*) *Barry v. Croskey* (1861), 2 J. & H. 1, at pp. 23, 24.

(*s*) A good instance of this use of the terms in question is to be found at p. 378 of *Andrews v. Mockford*, [1896] 1 Q. B. 372, C. A., where Lord ESHER, M.R., said: "the jury have found that the *natural* consequence of the publication in the newspapers was that the plaintiff should buy shares; and, *if so*, the injury received by the plaintiff was the *immediate, and not the remote*, consequence of the representation thus made."

(*t*) See § 139, *ante*. The three propositions are set out at pp. 22-24 of *Barry v. Croskey*, *sup*.

no acting is injured or damnified, it must appear that such false representation was made with the direct intent that it should be acted upon by such third person in the manner that occasions the injury or loss." The exact meaning of these two propositions is very difficult to extract. This much is clear, that the two, which largely consist of repetition, may be read as one; and that, taken together, they are meant as adaptations of the first rule (which applies to an immediate representee) to the case of a third person, and are intended to lay down that certain matters are essential to a cause of action in the latter class of case, which are not essential to the former. What are these additional matters? First the "intent," afterwards described as the "direct intent" (which is a meaningless phrase, and in no way distinguishable from "intent" (of the representor that his representation should be acted on as in fact it was; secondly, the immediacy, as opposed to the remoteness, of the causal connection between the representation and the damage. But the first of these qualifications, if the views above expressed are correct, is no more true of the one class of case than the other, except in a sense in which it is equally true of both, whilst the second qualification is also, as we have already seen, equally true of both. Whether the representee is the person to whom the representation was made, or a third person whom it was intended to reach, he must in either case prove that the representor actually or presumptively intended it to be acted on by him in the manner in which it was, and that the damage which he sustained was the natural and probable (and *in that sense* not the remote) consequence of his so acting. No doubt, it is generally less easy to prove the facts in the latter case, than in the former; but the facts to be proved are precisely the same in both, and the principles governing them are the same.

150. The last of the three heresies above referred to again originated with Bacon (*u*), who states as an exception (which points to the unsoundness of the rule itself) that "the rule" (that is, the *causa proxima* maxim) "faileth in covinous acts which, though they be conveyed through many degrees and reaches, yet the law taketh heed to the corrupt beginning, and counteth all as one entire act." But Bacon is here obviously applying to questions of causality, which are purely scientific and impersonal, considerations which can only affect criminal or ethical questions of personal motives. The supposed exception is no exception at all to the true rule, though it undoubtedly is to Bacon's erroneous statement of it. Whether a certain result flowed from a certain wrongful act, in the ordinary course of events, or naturally and probably, or in fact, is a question the answer to which cannot possibly depend on the moral aspect of the wrongful act, any more than if one were considering the causes of any physical phenomenon. For the purposes of determining whether the misrepresentation was fraudulent, and therefore the subject of an action for damages at all, these considerations are of course all-important; but, in any case where it has once

(*u*) Vol. vii, p. 328 (*ed. supracit*).

been established that the action on this score is maintainable, subject only to proof that damage has been caused, the further inquiry which must then be instituted as to the existence and nature of such causality is not in the least concerned with the character of the misrepresentation. It is not the law that, for this purpose, a less degree or amount of proof is required than if the action were for any other tort where it is necessary to establish actual damage; though, as will be seen hereafter (x), a pious opinion to this effect seems to have been occasionally entertained.

Sub-sect. (2). Burden of Proof and Questions of Law and Fact.

151. All questions of damage are questions of fact, the burden of establishing which is upon the representee (y), subject to the following, which are questions of law, viz. (i) whether there is any evidence of any temporal damage having been sustained at all, (ii) whether the alleged damage amounts to what the law regards as damage, (iii) whether there is any evidence that the alleged damage was caused by the representee's belief in the truth of the alleged misrepresentation, and (iv) whether the proved damage, though shown to have been produced by the proved misrepresentation, was its natural and probable, or (as the case may be) its actually intended, consequence (z).

(x) § 238 in Ch. X, Sect. 3, *post*.

(y) *Pasley v. Freeman* (1789), 3 Term. Rep. 51, where, at p. 56, BULLER, J., cites CROKE, J., as having said that "fraud without damage, or damage without fraud gives no cause of action; but when these two concur, an action lies." The case in which CROKE, J., is supposed to have so expressed himself is *Baily v. Merrell* (1615), 3 Bulstr. 94; but there must be some mistake somewhere, for what CROKE, J., is reported to have said, at p. 95, is not quite this. However, in any case, the statement attributed to CROKE, J., is correct, and, if he did not say it, he ought to have done so. See also Lord BLACKBURN, at pp. 195, 196 of *Smith v. Chadwick* (1884), 9 App. Cas. 187, H. L. If no actual damage is proved, the representee fails altogether: for there is no legal presumption of nominal damage, as in cases of breach of contract, or the infringement of a personal right or title: see *Hyde v. Bulmer* (1868), 18 L. T. 293.

(z) See, generally, the cases already cited in the notes to this Section, and add to them: *Vernon v. Keys* (1810), 12 East, 632, (*per* Lord ELLENBOROUGH, C.J., at p. 638, in the Court of C. P., *aff.* (1812), 4 Taunt. 488, Exch. Ch.); *Eastwood v. Bain* (1858), 3 H. & N. 738; *Bear v. Stevenson* (1874), 30 L. T. 177, P. C.; *Clydesdale Bank v. J. & G. Paton*, [1896] A. C. 381, H. L. (*per* Lord DAVEY at pp. 397, 398); *Tallerman v. Dowsing Radiant Heat Co.*, [1900] 1 Ch. 1; and *Stevens v. Hoare* (1904), 20 T. L. R. 407, *per* JOYCE, J., at p. 409. See, as to the proof of damage in the statutory action against directors of companies in respect of prospectuses, Ch. XIII, Sect. 1, *post*.

CHAPTER VIII.

WHO ARE DEEMED PARTIES TO A MISREPRESENTATION.

152. IN any proceeding of whatsoever nature, in which misrepresentation is set up, either as a cause of action, or ground of complaint, or as an affirmative plea or answer, the only person entitled to relief is the representee, and the only person liable is the representor, subject to the rules of procedure as to the transmission of such title and liability by reason of death, marriage, insolvency, assignment, and the like, and as to the right and duty of certain persons to sue and defend on behalf, or as representing the estate, of any person under disability (*a*). It is necessary, therefore, before discussing in detail the various remedies and forms of relief available to the representee against the representor (*b*), to ascertain precisely who are the persons deemed in law to come within these several designations.

SECT. 1. THE REPRESENTOR.

153. A representor is described in Article 1 of the Code as a person by or on behalf of whom the representation is made. This involves an examination of the topics of agency, co-agency, sub-agency, and joint and several responsibility in respect of representations.

Sub-sect. (1). General Statement.

154. The following is a general statement of the rules for determining what persons are deemed "representors," and responsible as such (*c*). In the first place, only he who actually makes the representation is liable for its consequences, if there was no principal or partner on whose behalf he made it; but if there was any person by whose express or implied authority he purported to, and did, make it, such latter person is deemed the representor or one of the two representors, as the case may be (*d*). Secondly, one of two co-agents, or a sub-agent, does not, merely as such, render the other co-agent, or the intermediate agent, respectively, liable

(*a*) These rules, as regards actions for damages, proceedings for rescission, and affirmative defences, are stated, or referred to, in Ch. X, Sect. 5, Ch. XI, Sect. 6, and Ch. XII, Sect. 3, *post*, respectively.

(*b*) See Chapters X, XI, and XII, *post*.

(*c*) These rules are stated in Article 22 of the Code.

(*d*) *Vide* Sub-s. (2), *post*.

as a principal for his misrepresentation (*e*). Thirdly, where it is necessary to show fraud, an innocent principal is liable for the fraud of his agent in making the misrepresentation, and, for this purpose, it makes no difference that the principal is a corporation (*f*). Lastly, all who concur in making any misrepresentation are jointly responsible to the representee for the consequences of its untruth, and, where it was fraudulent also, are jointly and severally responsible (*g*).

Sub-sect. (2). Principal liable for his Agent's Act of Misrepresentation.

155. Any person, whether principal or partner, and whether generally or for the purposes of the particular transaction, by whose express or implied authority a representation purported to be and was made, is accountable to the representee, if it turns out to have been false, in any proceedings for rescission or analogous relief. Where damages are claimed, and fraud therefore must be proved, different considerations arise, which form the subject of separate treatment below (*h*). But in an action of contract, which an action for rescission is, the agent's representation, where he both purported to, and did, make it on behalf of a principal, whether an individual, or a firm in which he is a partner, is the act of such principal. Where the authority conferred was express, no difficulty arises; where it is alleged to have been an implied authority, the question, in each case, must be determined in accordance with the principles of the law of agency, or of partnership, which for this purpose is only a branch of the law of agency (*i*).

156. In relation to misstatements by agents of a company, ROMER, J., has made some useful observations, which can easily be adapted so as to admit of a general application (*k*). He classifies the agents who can bind a company by such misrepresentations as follows: (1) general agents, *e.g.* the directors, acting at a board meeting, or otherwise as a board; (2) special agents, *i.e.* persons expressly authorized to procure subscriptions for shares, or whose acts in so doing are afterwards adopted and ratified by the company; (3) persons who, without authority, have induced contracts to take shares by misrepresentations, of the making and the falsity of which representations the company becomes aware before the contracts are completed; and (4) persons who, without authority, or even before the company has been incorporated, have issued a prospectus or other document, where the company knows of the issue, and knows that applications for shares have been

(*e*) *Vide* Sub-s. (3), *post*.

(*f*) *Vide* Sub-s. (4), *post*.

(*g*) *Vide* Sub-s. (5), *post*.

(*h*) *Vide* Sub-s. (4), *post*.

(*i*) See, as to the various classes of agents, Lord Halsbury's *Laws of England*, title, "Agency," vol. i, pp. 152, 153, and the various treatises on agency and partnership. The same principles apply to representations on which estoppel is founded, see *Laws of England*, title, "Estoppel," vol. xiii, pp. 385, 386. As to principal and agent, in relation to *dolus*, see App. C, Sect. 2, Sub-s. (4).

(*k*) *Lynde v. Anglo-Italian Hemp Spinning Co.*, [1896] 1 Ch. 178, at pp. 182, 183.

based on representations contained in such prospectus or document, and, though ignorant in the first instance of the nature of the representations, discovers, before the contracts are completed, what they were, and that they were false. Wherever the alleged agent has been shown to have had the implied authority of the alleged principal, and to have purported to act thereunder, such principal has, in accordance with the above and other principles applicable to the determination of this question, been held liable as a representor (*l*) ; where otherwise, he has been held not so liable (*m*).

157. In cases of the above description, that is to say, where rescission merely is sought, and the proceedings are not framed in tort, and the alleged principal escapes, the alleged agent remains, as he always was from the first, liable (assuming, of course, that all other requisites of the cause of action are satisfied). Conversely, where the alleged principal is held to have been such, the agent escapes (*n*), for the contract which is sought to be avoided was not made with him, but with the principal ; and the old and disreputable practice of adding agents, particularly solicitors, as co-defendants to such proceedings, whether for the purpose of mulcting them in costs, or to obtain discovery, or with the still more shameful motive of inducing them to put pressure on their client co-defendants to settle the action, has long since been denounced by the highest judicial authority (*o*), and is now, happily, obsolete.

(*l*) As in *Re Metropolitan Coal Consumers Association, Karberg's case*, [1892] 3 Ch. 1, C. A. (*per* LINDLEY, L.J., at p. 13) ; and in *Re Metal Constituents, Ltd.*, *Lord Lurgan's Case*, [1902] 1 Ch. 707, where the company would have been held liable, on the principle of the last case, but for the fact that the applicant had disabled himself from relying on the point by having signed the memorandum of association (see pp. 709, 710). Both the above were cases where the company knew of the prospectus, and of the misstatements therein, before they were acted upon, though it had been issued by persons who were not, and (since the company had not then been registered) could not have been its agents at the time.

(*m*) As was the case in *New Brunswick and Canada Railway and Land Co. v. Conybeare* (1862), 9 H. L. C. 711 (secretary of company held to have no implied authority to make representations as to the value of its shares) ; *Western Bank of Scotland v. Addie* (1867), L. R. 1 H. L. (Sc.) 145, *per* Lord CRANWORTH, at pp. 166-168 ; and *Thorne v. Heard and Marsh*, [1895] A. C. 495, H. L., where it was held that the alleged agent was not in law the agent of the alleged principals, the mortgagees, but of the mortgagor, *per* Lord HERSCHELL, L.C., at p. 502, and Lord DAVEY at p. 506.

(*n*) *Eaglesfield v. Londonderry (Marquis)* (1878), 26 W. R. 540, H. L., *per* Lord BLACKBURN at p. 541, disagreeing, to this extent, with certain expressions used by JESSEL, M.R., in the court appealed from—(1876), 4 C. D. 693, C. A.—though agreeing with the decision itself : “ as to the directors, it seems to me that neither at law nor in equity is an agent personally liable upon a contract by which he, within the scope of his authority, renders his principal liable, though it is of course otherwise in the case of a tort.” The opinion to the contrary which was expressed by ROMILLY, M.R., in *Pulsford v. Richards* (1853), 17 Beav. 87, and again at pp. 238, 239 of *Jennings v. Broughton* (1854), 17 Beav. 234, clearly cannot now be accepted at law if it ever was.

(*o*) Lord SELBORNE at p. 255 of *Barnes v. Addy* (1878), 9 Ch. App. 244, H. L., and at pp. 40, 41 of *Burstall v. Beyfus* (1884), 26 C. D. 35, C. A., as also JESSEL, M.R., at p. 502 of *Mathias v. Yettis* (1882), 46 L. T. 497, C. A., reprobate the practice in the strongest terms. It is no longer possible to say, as SHADWELL, V.-C., did in *Beadles v. Burch* (1839), 10 Sim. 332, that solicitors, to whom “ punity of intentions ” are expressly attributed, can be properly joined as defendants. *Aliter*, if they are shown to have assisted, or been implicated in, any improper conduct, in which case they may be mulcted in costs : see Ch. XV, Sect. 2, Sub-s. (3), *post*.

Sub-sect. (3). The Position of Co-agents and Sub-agents.

158. One of several agents of the same principal does not, *as such*, by any representation which he may make, render his co-agent liable to the representee for the consequences thereof (*p*). Some express authority must be shown *in hac re*, if such a result is to follow (*q*). The only persons liable in such cases, failing proof of particular instructions, are (1) he who actually made the representation; (2) those who concerted it, or took part in it; and (3) the principal for whom the agent, in the performance of his duties as agent, made it (*r*).

159. A sub-agent may render the ultimate principal liable for his representations, on the basis of implied authority, if the proved circumstances are such that it must be deemed to have been intended and agreed by and between the ultimate principal and the intermediate agent, that the latter should appoint a substitute for the purpose of discharging in his stead, but on behalf of the former, duties including or involving the making of representations of the character of that sued upon (*s*). Otherwise, direct intervention and express authority on the part of the ultimate principal must be shown by evidence (*t*). In no other way can the principal become responsible as a representor.

Sub-sect. (4). The Liability of Principal and Agent respectively for Fraudulent Misrepresentation.

160. Hitherto the respective liability of principal and agent for misrepresentation has been considered from the point of view of contract. It remains to examine the more difficult questions which arise when the action is to recover damages, and when (since such an action can only be brought for fraudulent misrepresentation) there are involved the separate characteristics, not only of tort, as distinguished from contract, but also of a state of the mind, as distinguished from a physical act. To any one who reviews the history of the growth of the now settled principles of law in relation to this particular kind of tort, it will be apparent that only by very slow and painful stages has English jurisprudence at length evolved a just and sound body of doctrine, and that a long and persistent succession of fallacies had first to be routed and overthrown before this desirable result could be achieved. It may now be stated summarily that the rules applicable to principal and agent, in reference to fraudulent misrepresentation as a tort, are, with one exception, exactly the same as those

(*p*) *Weir v. Bell* (1878), 3 Ex. D. 238, C. A. (*per* BRAMWELL, L.J., at p. 245, and COCKBURN, C.J., at pp. 247, 248, 250). Cp. *Re Denham & Co., Ltd.* (1883), 25 C. D. 752, 764, 765.

(*q*) *Cargill v. Bower* (1878), 10 C. D. 502, *per* FRY, J., at pp. 513, 514.

(*r*) *Ibid.*, *per* FRY, J., at p. 514, and *Bear v. Stevenson* (1874), 30 L. T. 177, P. C.

(*s*) *De Bussche v. Alt* (1878), 8 C. D. 286, C. A., at pp. 310, 311.

(*t*) Such intervention and direct relation was proved in *Powell and Thomas v. Evans, Jones & Co.*, [1905] 1 K. B. 11, C. A. (*per* COLLINS, M.R., at pp. 17, 18, STIRLING, L.J., at p. 20, and MATHEW, L.J., at pp. 22, 23).

applicable to misrepresentation as inducing a contract which on that ground is the subject of proceedings for rescission without reference to the fraud or honesty of the representor. The exception referred to is that the agent who makes a fraudulent misrepresentation is liable as well as the principal (*u*), whereas, as has been shown (*x*), in cases of rescission for innocent misrepresentation, where the principal is liable, the agent is not, and *vice versâ*. It has, indeed, been held in one recent case (*y*) that there is another exception, viz. that, though a misrepresentation for the purpose of proceedings to rescind a contract may be ratified, it cannot be so ratified where it is treated as a tort, and that, in such cases, there can be no liability on the part of a person who, after his alleged agent (not being so in fact) has made the misrepresentation, intervenes and adopts the benefit of it, and that such person cannot be deemed, in virtue of those circumstances alone, a representor, or an accessory after the fact; but this decision is totally opposed to the whole current of authority, and cannot be accepted as law. It is now thoroughly well established that a tort can be ratified as much as a contract (*z*).

161. The now exploded heresies above referred to, or the chief of them, have been the following: (1) that there is something peculiar in fraud, by reason of the fact that not only an act but a state of mind has to be established, which differentiates it from other torts, and that a man can never have implied authority to commit a fraudulent act, or thereby render his innocent principal liable; (2) that, even if a principal can ever be liable for the misrepresentation, coupled with the guilty knowledge, of his agent, there is no liability in either, where the one made the misrepresentation but had no guilty knowledge, and the other had the guilty knowledge but did not make the misrepresentation; (3) that it is incumbent on the representee to show that the principal who is charged as representor benefited by the fraud of his agent, and that he can only recover damages to the extent of such benefit, regardless of the damage to himself; and (4) that a corporation is not liable in tort for the fraud of its agents, or (in the less audacious modern expression of the theory) not to any greater extent than the benefit which it has derived thereby, even if an individual can be so liable. An account, in the above order, of the birth, growth, and extinction of these fallacies will (it is believed) be the best exposition of the sounder principles now accepted.

162. The first of the false doctrines above enumerated has its origin in

(*u*) See the statement of Lord BLACKBURN cited in note (*n*) above, and title "Agency," vol. i. pp. 224, 225, in Lord Halsbury's *Laws of England*.

(*x*) See § 157, *ante*.

(*y*) *Hoole v. Speak*, [1904] 2 Ch. 732, *per* KEKEWICH, J., at pp. 735, 736.

(*z*) See *Re Denham & Co.* (1883), 25 C. D. 752, *per* CHITTY, J., at p. 765, and *Wilson v. Tunstman* (1843), 6 M. & G. 236, *per* TINDAL, C.J., at p. 242, cited and approved by Lord MACNAGHTEN at pp. 246, 247 of *Keighley, Maxsted & Co. v. Durant*, [1901] A. C. 240, H. L. It is only fair to say that none of the authorities establishing this point were cited to KEKEWICH, J., though he asked for them, and he thereupon inferred that there were none. At p. 444 of *Glasier v. Rolls* (1889), 42 C. D. 436, KEKEWICH, J., himself had used language implying the correct view.

no less a place than the House of Lords, in 1848. True, the House itself may be acquitted of this enormity, for it formed no part of the actual decision in the case referred to, but not so Lord CAMPBELL, who, in the course of the argument, delivered himself of a dictum to the effect that in cases where fraud is alleged, such fraud must be brought home *personally* to the person charged, and that to prove the fraud of his agent is not enough (a). This dictum, after having been vigorously denounced by Lord ST. LEONARDS in one of his treatises, openly dissented from in 1852 by KNIGHT-BRUCE, L.J. (b), charitably explained away by POLLOCK, C.B., and WILDE, B., at the expense of the reporters in 1861 (c), and ignored altogether in numerous intervening cases (d), has long since lost any authority which it may have ever possessed, and has perished of inanition. But a vague notion that there is some inherent distinction between fraud and other torts, for the purpose of fixing the principal with liability, must have lingered for a while, since the Exchequer Chamber deemed it necessary, in 1867, to give it its quietus in set terms; and it is now settled, beyond all cavil or question, that an innocent principal is liable in tort for the fraudulent misrepresentation of his agent, where both the act of misrepresentation, and the state of mind which rendered the misrepresentation fraudulent, were respectively the act, and the state of mind, of the agent (e),

(a) *Wilde v. Gibson* (1848), 1 H. L. C. 605, at pp. 632, 633.

(b) At pp. 683, 684 of *Reynell v. Sprye*, *Sprye v. Reynell* (1852), 1 De G. M. & G. 660.

(c) *Udell v. Atherbon* (1861), 7 H. & N. 172, at pp. 181, 182, where WILDE, B. (who, it is curious to observe, had been one of the parties in *Wilde v. Gibson* in its later stages, by reason of his having married in the interim Mdlle. D'Este, the lady who was originally defendant), in delivering the judgment of POLLOCK, C.B., and himself, said: "the only dictum in favour of it is, I believe, that of Lord CAMPBELL, in the course of the argument in *Wilde v. Gibson*. It may be doubted if it is correctly reported; at any rate, it is to be taken, in my opinion, in reference only to the point then under argument." A much better excuse for the dictum would have been disclosed if, instead of casting an unjust and calumnious slur upon the accuracy of the reporters, who could not answer for themselves—a common device, even now, of judges who, anxious to save the face of some eminent authority shown to have been betrayed into the use of an indiscreet expression, have not the courage to say plainly that it is not law—the court had drawn more pointed attention to the fact that Lord CAMPBELL had only thrown out this observation as a sort of challenge or query to counsel, in the course of debate, when opinions are in a state of flux, and that, even if it is fair to a judge to record such deliverances at all, it is certainly not right to attach to them the same importance that belongs to statements which form part of his considered judgment, when the arguments are concluded, and his mind is made up. In *Fuller v. Wilson* (1842), 3 Q. B. 58, the opinion of the Q. B., at p. 67 ("we think the principal and his agent are for this purpose completely identified") was not dissented from on appeal (3 Q. B. 68, 1009, Exch. (h.)), though the decision itself was.

(d) *Blair v. Bromley* (1847), 2 Ph. 354, *per* Lord COTTENHAM at pp. 359-361; *Denton v. G. N. Ry. Co.* (1856), 5 E. & B. 860, where, if in any case, the point might well have been taken, if it had been thought arguable by the eminent counsel who appeared for the railway company, but it was not; and *Re Royal British Bank, Ex parte Brockwell* (1857), 26 L. J. (CH.) 855, *per* KINDERSLEY, V.-C., at p. 856. In *Udell v. Atherton*, *sup.*, the Court of Exchequer was equally divided on the question whether the principal, who had no guilty knowledge, could be responsible for the misrepresentation of his agent (as to the soundness of a log of timber) who had such knowledge, POLLOCK, C.B., and WILDE, B., being of opinion in the affirmative, and MARTIN and BRAMWELL, BB., in the negative.

(e) *Barwick v. English Joint Stock Bank* (1867), L. R. 2 Exch. 259, Exch. Ch., at p. 265: "with regard to the question whether a principal is answerable for the

and that, accordingly, in all such cases, the alleged fraud is properly described and pleaded as the fraud of the principal (*f*), or, in other words, that the principal is deemed the fraudulent representor, and is responsible as such. Exactly the same erroneous theory prevailed for a long time with reference to another state of mind, malice, in the law of defamation, where again it was, until quite recently, doubted whether a principal can ever be liable for the actual malice of his agent, as distinct from the mere act of publication; but these doubts have now been disposed of, and set at rest in the same sense (*g*).

163. Notwithstanding the demolition of the above fallacy, there remained behind a second, which has proved of a much more subtle and persistent nature, and which cannot be said to have been authoritatively dispelled until so recent a date as 1907. The fallacy in question was this: even assuming the correctness of the rule that an innocent principal can be deemed a representor in respect of a misrepresentation personally made by the agent, and with personal fraud on the agent's part, the rule has no application to a case where the principal alone had the knowledge which, if he had made the representation, would have rendered it fraudulent, whilst the agent alone made the representation without any express authority from the principal. It was held by the majority of the Court of Exchequer, in 1840, that, in such a case the fraudulent representation could not be imputed to either principal or agent (*h*). This view can no longer be accepted as law. As regards the case itself, besides the powerful dissentient judgment of Lord ABINGER, C.B. (*i*), we find qualifications and concessions in the judgments both of PARKE, B., and of ROLFE, B. (*k*), which go far to destroy the cogency of the rule enunciated

acts of his agent in the course of his master's business, and for his master's benefit, *no sound distinction can be drawn between the case of fraud and the case of any other wrong*. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service, and for the master's benefit, though no express command or privity of the master be proved." The above rule, as formulated by the Exchequer Chamber, has been cited and applied in all the subsequent cases, from *Mackay v. Commercial Bank of New Brunswick* (1874), L. R. 5 P. C. 394 (see pp. 410-403) to the present time. In *Blake v. Albion Life Assurance Co.* (1878), 4 C. P. D. 94, GROVE, J., at p. 105, expressed some doubt whether an innocent principal would be liable in damages for the fraudulent misrepresentation of his agent, but agreed with the rest of the court that he clearly was so liable in an action for money had and received: it is obvious, however, that the dictum, and the supposed distinction, are both unsound, for if the principal is to be deemed a fraudulent representor, he must be responsible in every kind of proceeding which may be taken against him as such: if he is not to be so deemed, he is not responsible in any.

(*f*) *Barwick v. English Joint Stock Bank*, *sup.*, at pp. 266, 267. As to an innocent partner in a firm being liable for the fraud of the guilty partners, see *Ex parte Adamson, Re Collie* (1878), 8 C. D. 807, C. A., at p. 820, and ss. 10, 11, of the Partnership Act, 1890.

(*g*) See the author's *Code of the Law of Actionable Defamation*, Article 37 (4), and note (*u*) thereto, and App. IV., Sect. 4.

(*h*) *Cornfoot v. Fowke* (1840), 6 M. & W. 358, *per* PARKE, B., at p. 373: "each person is innocent, because the plaintiff made no false representation, and the agent, though he made one, did not know it to be false; and it seems to me to be an untenable proposition that, if each be innocent, the act of either or both can be a fraud." To the same effect, ROLFE, B., at p. 370, and ALDERSON, B., at pp. 371, 372.

(*i*) *Cornfoot v. Fowke*, *sup.*, at pp. 377-385; see, particularly, p. 382.

(*k*) *Ibid.*, at p. 370 (where ROLFE, B., admits that, if the principal is proved to have selected an agent who knows nothing, for the very purpose of enabling such agent to

by the majority; and the decision was distinctly disapproved of by WILLES, J., in 1867 (*l*), treated as doubtful by the Court of Appeal in 1881 (*m*), and finally condemned by the House of Lords in 1907 (*n*), where the question was at last clearly and definitely put upon its proper basis, and made to depend upon the governing principle, so strangely lost sight of in nearly all the previous decisions, that "the principal and agent are one, and it does not signify which of them made the incriminated statement, or which of them had the guilty knowledge" (*o*). When once this principle is grasped, the strange idea that, whilst the physical act of one person may be deemed in law the act of another, his mental state cannot be so deemed; that an agent's will, but not the knowledge which accompanied the exercise of that will, may be imputed to his principal—is seen to be unsound, and the doubts and subtleties born of it vanish. If it be true, as it is, that agent and principal are one in law for the purpose of the several acts of the body or the mind which make up a fraudulent misrepresentation, it is just as absurd to talk of the absence of liability in either because one of them did not make the statement, and the other did not know it to be untrue, as it would be for a single natural person to plead that his fraudulent mind did not say the words, and his inaccurate tongue was innocent of guile, and that, inasmuch as neither his mind nor his tongue sinned separately, he never sinned at all—in other words, to revive in a modern guise the ancient and much derided Euripidean formula, ἡ φρὴν ὁμώμοχ', ἡ δὲ γλῶσσ' ἀνώμοτος.

164. The third misconception in relation to the question of a principal's responsibility for the fraudulent misrepresentation of his agent—which, again, was the outcome of the persistently hesitating and illiberal attitude

make representations which will not render such principal liable, the rule laid down would not apply), and at p. 364 (where PARKE, B., expresses his concurrence with this view). This was exactly what happened in *Ludgater v. Love*, cited in note (*m*), *infra*.

(*l*) In the course of the argument, at p. 262 of *Barwick v. English Joint Stock Bank* (1867), L. R. 2 Exch. 259, Exch. Ch., where he pointedly observes: "I should be sorry to have it supposed that *Cornfoot v. Fowke* turned upon anything but a point of pleading."

(*m*) *Ludgater v. Love* (1881), 44 L. T. 694, C. A., where the defendant employed his son to sell sheep for him, and impliedly to represent that they were "all right," whereas, to the knowledge of the defendant, but not to that of his agent, they were infected with disease, and it was held that this brought the case within the exception referred to, as above stated, in *Cornfoot v. Fowke*, so that it became unnecessary to criticize the validity of the rule itself, though it may be gathered that the C. A. thought it at least open to question.

(*n*) *S. Pearson & Son, Ltd. v. Dublin Corporation*, [1907] A. C. 351, H. L.

(*o*) *Ibid.*, per Lord LOREBURN, L.C., at p. 354, a statement of the law which is expressly concurred in and repeated in almost identical terms, at pp. 358, 359, by Lord HALSBURY, who also takes occasion, at pp. 357, 358, to observe upon *Cornfoot v. Fowke*, *sup.*, as follows: "If it was supposed to decide that the principal and agent could be so divided in responsibility that—like the schoolboy's game of 'I did not take it,' 'I have not got it'—the united principal and agent might commit fraud with impunity, it would be quite new to our jurisprudence. One of the learned judges who decided *Cornfoot v. Fowke* explained it by saying that it was only decided on a point of pleading"—see note (*l*), *sup.*—"and another"—this was ROLFE, B.—"by saying that it was attempted to add a term to a written contract which was not in it. Whether these were satisfactory reasons I do not care to inquire. It is enough to say that the case is not law if it is supposed to affirm the proposition to which I have referred." See also the observations of Lord JAMES at p. 361.

assumed in all stages of our jurisprudence by those to whom it fell to deal with this branch of law—is the notion that, in such cases, a principal is liable to the extent only of the benefit which he derived from his agent's act, and not, as in all other cases of tort, to the extent of the injury done to the party who is damaged, irrespective of the question whether the wrongdoer has profited thereby—a question which obviously does not affect either the quality of the act, or the damage which it causes. This error derived its origin from a perhaps not sufficiently guarded expression used by the Exchequer Chamber in the enunciation of the rule already referred to (*p*). A few years afterwards the Privy Council thought there was sufficient doubt about the question to justify their abstention from expressing any opinion upon it, or upon the converse question as to whether a principal is liable for the misrepresentation of an agent not made within the scope of his authority, but from which the principal has derived benefit (*q*). But it is quite clear, as afterwards explained by Lord ESHER, M.R., that the expression in question, “for the master's benefit,” was intended to mean no more than that the servant or agent “must be acting for the principal, since, if there is authority to do the act, it does not matter if the principal is benefited by it” (*r*), and that, in laying down that the agent must be acting for his principal's benefit in this sense, as well as acting “in the course of the service,” the Exchequer Chamber only intended to exclude the case of an agent doing something well within the scope of his authority, which, if nothing else were proved, would render the principal liable, but doing it for his own private and personal ends, and not for the *intended* benefit of the principal, in which event the principal who, *ex hypothesi*, had given no express authority, and would, on the contrary, have expressly forbidden and punished the act, could not possibly be held accountable; and this in fact was the very case before the Court of Appeal in deciding which Lord ESHER, M.R., gave the above explanation of the language used by the Exchequer Chamber (*s*). That explanation has been readily accepted, and acted upon, in all cases where the principal has been an individual (*t*), but, as will be seen immediately, wherever the principal has been a corporation, the old erroneous suggestion has from time to time reappeared in argument, not without a certain amount of judicial countenance and encouragement.

165. The last of the heresies alluded to issues from the two curious

(*p*) *Barwick v. English Joint Stock Bank, sup.*, at p. 265. The rule is cited in note (*e*), *ante*.

(*q*) At p. 416 of *Mackay v. Commercial Bank of New Brunswick* (1874), L. R. 5 P. C. 394

(*r*) *British Mutual Banking Co. v. Charnwood Forest Railway Co.* (1887), 18 Q. B. D. 714, C. A. at p. 717.

(*s*) *Ibid.*

(*t*) To take one of the latest cases as an example, in *Malcolm, Brunner & Co. v. Waterhouse and Sons* (1908), 24 T. L. R. 854, WALTON, J., applied the rule framed by the Exchequer Chamber, as explained by Lord ESHER, M.R., and held the defendant liable for the fraudulent misrepresentation of his agent, on the express ground that it was made “in the *supposed* interests of the defendant.”

doctrines, first, that, for the purposes of any act involving motive or a condition of the mind, a corporation, which in the literal sense has no mind, stands in a position of greater immunity than a private individual; and secondly, that, for the purposes of pecuniary compensation, a corporation whose rights and duties in the administration of property are usually circumscribed by statute or charter in the interests of the corporators, ought not, having regard to these interests, to be mulcted for a tort committed by its agents to any greater extent than is involved in the restoration to the injured party of the benefit or profit (if any) which has accrued to it thereby. The perverse subtlety of Lord BRAMWELL did a great deal to foster the former illusion (*u*), and the extravagant deference paid by English lawyers to corporations from the time of Coke (in whom, indeed, it amounted to positive idolatry) probably gave rise to the latter. That the former theory is wholly erroneous has never been much doubted, since at least the year 1854 (*x*), judging from the whole current of authority, only once interrupted since that date by some startling dicta emanating from Lord CHELMSFORD, L.C., and Lord CRANWORTH, in 1867 (*y*), which were not in the least necessary

(*u*) In *Pharmaceutical Society v. London Provincial Supply Association* (1880), 5 App. Cas. 857, H. L. (a case involving the question whether a corporation was, as a "person," subject to certain penalties prescribed by a statute), Lord BLACKBURN, at pp. 869, 870, notices, and expresses his emphatic dissent from, the view which Lord BRAMWELL, then BRAMWELL, L.J., had expressed in the Court of Appeal, that a corporation could not be guilty of malice. Undaunted, however, by this criticism, Lord BRAMWELL six years afterwards, as a law Lord, reiterated the opinion at pp. 250-254 of *Abrath v. N. E. Railway Co.* (1886), 11 App. Cas. 247, H. L. (a case of malicious prosecution) that a corporation could not be liable in that, or any other, form of proceeding which involves proof of motive, or a mental state, because it "is incapable of malice or motive;" but, again (*per* SELBORNE, L.C., at p. 256) it was made quite clear that this deliverance was the expression of a personal view, and formed no part of the judgment of the House. See App. IV, Sect. 4, of the author's *Code of the Law of Actionable Defamation*, where the subject is discussed in relation to "actual malice," and where, referring to Lord BRAMWELL, it is remarked that "it is strange that this acute reasoner did not realize that his proposition is, in one of its two possible senses, a truism, and, in the other, ridiculously incorrect. In the sense that a corporation cannot, *as such*, exercise the faculty of thought, or conceive an intention or motive, it is true; but it is equally true that, in that sense, it cannot execute any act whatsoever, not even the act of affixing the corporate seal to an instrument; since, except through an agent, it can no more perform an act of the body than it can an act of the mind. But, in the other sense, it is as untrue to say that, in contemplation of law, the thoughts, motives, and intentions of its agents cannot be imputed to it, as it would be to say that the acts of those agents cannot."

(*x*) *Ranger v. G. W. Railway Co.* (1854), 5 H. L. C. 72, *per* Lord CRANWORTH, L.C., at pp. 86, 87 ("where a corporation is formed for the purpose of carrying on a trading or other speculation for profit, such as forming a railway, these objects can only be accomplished through the agency of individuals; and there can be no doubt that, if the agents employed conduct themselves fraudulently, so that, if they had been acting for private employers, the persons for whom they were acting would be affected by their frauds, the same principles must prevail where the principal under whom the agent acts is a corporation"). In *Denton v. G. N. Ry. Co.* (1856), 5 E. & B. 860, no one even suggested that the defendants were not liable on the ground of their corporate character.

(*y*) In *Western Bank of Scotland v. Addie* (1867), L. R. 1 H. L. (Sc.) 145, *per* Lord CHELMSFORD, L.C., at p. 158, and Lord CRANWORTH at p. 167, who, whilst recognizing that the fraudulent misrepresentations of its agent are imputable to a corporation for the purposes of rescission (which was the form of proceeding then before the House), took occasion to append to this correct statement the needless, and wholly erroneous, additional proposition that, where the action is for deceit, such misrepresentations

to the decision, and therefore are of no authority, have never been followed, (z) and, on the contrary, have been expressly disapproved (a); though, in relation to another condition of the mind, malice, the ridiculous fallacy has flourished exceedingly until a quite recent date (b). But one cannot say the same of the other doctrine referred to. On the contrary, the contention that a corporation can never be liable in damages for the fraudulent misrepresentation of its agents beyond the extent to which it has benefited, or, if it has derived no benefit, not at all, has for a long time past been and is still occasionally put forward (c): and all one can say about it is that there is no express *decision* in favour of it, that, though never formally overruled, it has been silently, but unmistakeably, ignored and disregarded (d), and that it is totally opposed to the whole theory of civil compensation for wrongs, and to the principles governing corporate responsibility. Once admit that a corporation is as accountable for the fraudulent misrepresentation of its agents as a natural person is—what is there in the judicial conception of a corporation as distinguished from that of an individual, or in the nature and incidents of fraud, as distinguished from those of any other tort, which should alter the principles upon which its liability is to be determined, and substitute, as the standard by which the injured party's compensation is to be measured, the benefit derived by it for the damage done to him? In all the cases in which the suggestion in question is made, no reasons are stated why it is to be accepted, and no answer is given to the question above propounded.

are not so imputable. Why, if they are imputable at all, their imputability can be affected by the form of relief asked for, no reason is given, and none can be given.

(z) See the cases cited in note (d), *inf.*

(a) By the Privy Council in *Mackay v. Commercial Bank of New Brunswick* (1874), L. R. 5 P. C. 394, where, at pp. 413–415, it was pointed out that the dicta referred to in the last note were wholly unnecessary to the decision. The Judicial Committee was therefore at liberty to, and did, dissent therefrom, on the ground of the absurdity of making the form of action the test of imputability. It was also pointed out that, in his above observations, Lord CRANWORTH was departing from the sound and genuine proposition which he had previously enunciated, as cited in note (x), which, and not the later exorcism, was approved.

(b) That is, until *Citizens' Life Assurance Co. v. Brown*, [1904] A. C. 423, P. C.

(c) Apparently, as late as 1887, the question was regarded by BOWEN, L.J., as an open one: see *British Mutual Banking Co. v. Charnwood Forest Railway Co.* (1887), 18 Q. B. D. 714, C. A., at p. 719 ("how far a statutory corporate body could in any case be made liable in an action of deceit beyond the extent of the benefit they had reaped by the fraud, is a matter on which I desire to express no opinion").

(d) For instance, in *Swift v. Jewsbury* (1874), L. R. 9 Q. B. 301, Exch. Ch., where, at pp. 312, 313, Lord COLERIDGE, C.J., delivering the judgment of the Court, says: "there can be no doubt that . . . where an agent of a joint stock company, in conducting its business, does something of which the joint stock company takes advantage and by which they profit, or by which they may profit, and it turns out that the act which is so done by their agent is a fraudulent act, justice points out, and authority supports justice in maintaining, that . . . they cannot afterwards repudiate the agency and say that the act which has been done by the agent is not an act for which they are liable" (a quite unqualified expression, it is to be observed, and not limited in any way to the extent of the profit reaped; and the unrestricted character of the proposition is further emphasized by the carefully added earlier words: "or by which they may profit"). In *S. Pearson & Son, Ltd. v. Dublin Corporation*, [1907] A. C. 351, H. L., where, the defendants being a municipal, and not a trading, corporation, the point that they could not be liable at all in an action of deceit, as that was, would have a complete answer to the action, if there were any substance in it; yet no one, in any of the courts, thought it worth while even to suggest it.

In the only class of case in which the benefit to the estate of a defendant is relevant, and must be proved, viz. when a personal action of tort is brought against the representatives of a deceased wrongdoer, there is a reason, and an excellent one, and the law has expressed it plainly. The representatives were never wrongdoers, and it is only just that they ought not to be punished for the wrong which another committed, but it is no less just that such estate, if augmented thereby, should restore the amount by which it has been so augmented (*e*). But no such reason has ever been given for a corporation not being liable beyond the amount by which its funds have been increased, or at all, if there has been no increase; nor can there be any such reason. *Ex concessis*, the corporation is a wrongdoer; *ex concessis*, the representee has been damaged by the wrong. It makes no difference to him that the representor has not profited, any more than this question would concern him if the tortfeasor had libelled or assaulted him, for which acts, producing ordinarily no benefit to the party inflicting the injury, it is not now suggested by any one that a corporation would not be liable. Still less does it matter to him, or affect the *quantum* of his damage, that the person who has caused him the loss and injury of which he complains is an agent of a corporation, and not either an individual acting on his own account, or the agent of another individual. Until, therefore, this curious doctrine is recommended for our acceptance by something in the nature of reason or argument, or is made the subject of authoritative and express decision, it is no presumption to pronounce it baseless (*f*).

166. There are various associations and bodies of persons, sometimes called *quasi*-corporations, which, though not incorporated for all purposes, or in the strict legal sense of the word, are yet answerable and suable for the wrongful acts of their agents, and therefore for their misrepresentations, in the same manner and to the same extent as corporations strictly so called, provided that the body of persons sought to be made responsible has a continuous identity, apart from the individuals composing it, and a collective name conferred or recognized by law, and is legally capable of holding and administering property and inflicting injury (*g*). Instances of

(*e*) See § 246 in Ch. X, Sect. 5, Sub-s. (2), *post*.

(*f*) It will be understood that the statements in the text are subject to the rule discussed in § 247, *post*, that where the representee is a shareholder in the corporation, he cannot sue it for damages, as long as he remains such shareholder; but this is not because a corporation is not liable as a representor, but because the representee by so suing would be taking up at the same time two wholly inconsistent and irreconcilable positions; also to the rule that a corporation cannot be made answerable for a fraudulent misrepresentation by their officer as to the extent of its powers, or the validity of its transactions, "by which they could not be bound if they had actually authorized him to make it," *per* BOWEN, L.J., at p. 718 of *British Mutual Banking Co. v. Charnwood Forest Railway Co.* (1887), 18 Q. B. D. 714, C. A.; and, lastly, to the rule that for misrepresentations as to credit, a corporation can never be liable—see Ch. X, Sect. 2, Sub-s. (4)—but this again results from the provisions of a statute dealing with this particular species of representation, and not from anything inherent in the nature of a corporation.

(*g*) *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*, [1901] A. C. 426, H. L., *per* Lord HALSBURY, L.C., at p. 436.

such bodies or associations are:—unincorporated improvement commissioners (*h*), trustees of turnpike roads (*i*), and, subject to the provisions of the Trade Disputes Act, 1906 (*k*), trade unions (*l*).

167. The liability of corporations sole is co-extensive with that of corporations aggregate, except that the Crown is not answerable in an action for the acts, and therefore not for the misrepresentations (*inter alia*), of its servants, or of public agents or officers (*m*) ; nor is any officer in the service of the Crown liable for the misrepresentations or other wrongs committed by any alleged agent who is also in the service of the Crown, but such officer may be liable personally as a representor, if sued personally, and not in his official character (*n*).

Sub-sect. (5). Implied Authority.

168. Where a principal is sought to be made liable, as a representor, for the misrepresentation of his agent, it is not often that an “express command” can be proved, and the representee is generally compelled to resort to the doctrine of implied authority. This doctrine has been expressed in various language, but the substance and meaning, behind all the forms of words which have been used, is one and the same, and the principle is quite plain and clear (*o*), though its application to the facts of any particular case may be a matter of considerable nicety. A man is said to have the implied authority of another to make the representation which, being false, or false and fraudulent (as the case may be), is to render that other answerable for its consequences to the representee, when it was, and purported to be, made in the course and within the scope and for the purposes of his service or employment or (where it is a case of partnership, which is mutual agency) of the partnership business or undertaking (*p*). In applying this principle, the nature of the service, employment, business, or undertaking must first be proved (unless admitted), and the question then is whether making representations at all is within “the class of acts” which the alleged agent or partner is employed, or engages, to perform; and, if so, the further inquiry may become necessary whether the representation sued upon belongs to the class of representations which he is employed, or which it is part of the partnership business, to make (*q*). If the proper answer to these questions is in the affirmative, the principal

(*h*) *Ruck v. Williams* (1858), 3 H. & N. 308.

(*i*) *Whitehouse v. Fellows* (1861), 10 C. B. (N. S.) 765.

(*k*) 6 Edw. 7, c. 47, s. 4 (1) of which exempts trade-unions from liability for tort.

(*l*) *Taff Vale Railway Co. v. A. S. R. S.*, *sup.*

(*m*) See Lord Halsbury's *Laws of England*, title “Agency,” vol. i. p. 213, and note (*f*) thereto.

(*n*) *Ibid.*, p. 224, and note (*i*) thereto.

(*o*) See generally, Lord Halsbury's *Laws of England*, title “Agency,” vol. i. pp. 161–168, and the various treatises on Principal and Agent, and Partnership.

(*p*) *Barwick v. English Joint Stock Bank* (1867), L. R. 2 Exch. 259, Exch. Ch.

(*q*) *Ibid.*, at p. 266 : “he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of the master to place him in.”

is liable as a representor; if either of them is answered in the negative, he is not (*r*).

169. Whether regarded as a tort, or not, a man may become liable as principal for the misrepresentation of another by adoption or ratification (*s*), and also by estoppel (*t*).

170. Cases not infrequently occur where, though the representee discharges the initial burden which rests on him of proving that the representation belonged to the class of acts, and also to the class of representations, which it was in the course of the agent's duty and employment to do and make, and where, therefore, the principal who is sought to be made liable as representor, if no further evidence were given, would be so, but where the alleged representor is in a position to displace this *prima facie* case by allegation and proof that the alleged agent was in fact acting solely for his own or a third person's private ends, and not with either the intention or result of conferring any benefit upon his principal. In all such cases, the representor is held not answerable, but, inasmuch as the burden of proving facts of this character, when once a *prima facie* case of implied authority has been established, is shifted on to the shoulders of the representor, this topic will find a more appropriate place in the examination of the various affirmative pleas to an action of deceit (*u*).

Sub-sect. (6). Liability of Joint Representators.

171. Where two or more persons join in a representation whereby they induce the representee to contract with them, or are joint contractors in

(*r*) In many of the cases already cited in this Section the implied authority was established, in accordance with the principles stated in the text: see particularly *Barwick v. Joint Stock Bank, sup.*, and *Mackay v. Commercial Bank of New Brunswick* (1874), L. R. 5 P. C. 394. It is not necessary to cite these over again: it is more important, for the purpose of illustrating the above principles and the mode in which they have been applied to various kinds of employment and agency, to call attention to some of the cases where the implied authority was *not* established, such as: *Burnes v. Pennell* (1849), 2 H. L. C. 497 (director of company), *per* Lord CAMPBELL at pp. 519, 520; *Wheelton v. Hardisty* (1857), 8 E. & B. 232, Exch. Ch. (medical attendant and referee of assured not agents to make the contract, or therefore, to affect him by fraudulent misrepresentation), at pp. 260, 268-274, and 301, 302; *Re Northumberland and Durham District Banking Co., Ex parte Bigge* (1858), 28 L. J. (CH.) 50 (a director of company), *per* KINDERSLEY, V.-C.; *Re Liverpool Borough Bank, Duranty's Case* (1858), 26 Beav. 268 (another company case); *Re National Patent Steam Fuel Co., Ex parte Worth* (1859) 28 L. J. (CH.) 589 (again a company case); *Re Royal British Bank, Ex parte Frowd* (1861), 9 W. R. 328 (bank clerk); *New Brunswick Canada Railway and Land Co. v. Conybeare* (1862), 9 H. L. C. 711 (secretary of company); *Newlands v. National Employers' Accident Association* (1885), 54 L. J. (Q. B.) 428, C. A. (secretary to company), *per* BRETT, M.R., at p. 430, and BOWEN, L.J., at p. 431; *Lynde v. Anglo-Italian Hemp Spinning Co.*, [1896] 1 Ch. 178 (agent of company), *per* ROMER, J., at pp. 184, 185; *Biggar v. Rock Life Assurance Co.*, [1902] 1 K. B. 516 (insurance agent) at pp. 524, 525; *Hoole v. Speak*, [1904] 2 Ch. 732 (a prospectus case); *M'Millan v. Accidental Insurance Co.*, [1907] Sc. Ct. of Sess. (as. 484 (insurance agency); and *Hindle v. Brown* (1908), 98 L. T. 791, C. A. (auctioneer).

(*s*) See as to torts, § 160, *ante*, and note (*z*) thereto; and as to contracts, Lord Halsbury's *Laws of England*, title "Agency," vol. i, pp. 173-181.

(*t*) See *Wright v. Crookes* (1840), 1 Scott (N. R.) 685, 56 R. R. 587, Exch. Ch., at pp. 698, 699, and, generally, Lord Halsbury's *Laws of England*, title "Agency," vol. i, pp. 158, 159, and title "Estoppel," vol. xiii, pp. 390-392.

(*u*) See Ch. X, Sect. 2, Sub-s. (5), *post*, and the cases there cited.

respect of any contract induced by any representation made by or on behalf of them, or any of them, and proceedings are taken by the representee to avoid such contract, all those persons are deemed joint representors in any such proceedings; whence it follows that, as in any other case of contract, each of them is liable *in solido* to the representee, if misrepresentation is proved, but any one of them has a right of indemnity, or contribution, on paying more than his aliquot share, against any other who has paid nothing, or less than his share (*x*).

172. Where, however, the misrepresentation, having been made, by more than one person, was fraudulent, and the action is for damages, all the persons who concurred in the fraud are, as in the case of any other tort, both jointly and severally answerable to the representee for the whole of the damages awarded (*y*), and being joint tortfeasors, none of them has any right of indemnity or contribution against any of the others (*z*).

Sub-sect. (7). Burden of Proof and Questions of Law and Fact.

173. The burden is on the representee of establishing that the representation was made by the person charged as representor, or by his authority, where he did not personally make it (*a*). Where either personal representation or express authority is alleged, the issue is entirely one of fact (*b*), subject to the question of law whether there is any evidence at all of such representation or authority. Where, however, implied

(*x*) This is an elementary principle of the law of torts. Instances of its application to cases of fraudulent misrepresentation are: *Cullen v. Thomson's Trustees* (1862), 4 Macq. H. L. 424 (*per* Lord WESTBURY, L.C., at pp. 432, 433); *Swift v. Winterbotham* (1873), L. R. 8 Q. B. 244 (*per* COCKBURN, C.J., delivering the judgment of himself and QUAIN, J., at p. 254), a case which was reversed *sub nom. Swift v. Jewsbury* (1874), L. R. 9 Q. B. 301, Exch. Ch., but not on any ground affecting the soundness of the above proposition; *Phosphate Sewage Co. v. Hartmont* (1877), 5 C. D. 394, C. A., at p. 456; and *Ex parte Adamson, Re Collic* (1878), 8 C. D. 807, C. A., at pp. 819, 820. And see, generally, the decisions in actions of deceit against directors of companies in respect of statements in prospectuses.

(*y*) See, amongst other cases, *Wolmershausen v. Gullick*, [1893] 2 Ch. 514.

(*z*) This is the rule laid down by Lord KENYON, C.J., in *Merryweather v. Nixan* (1799), 8 Term. Rep. 186, with reference to torts in general (the case itself was one of injury to the reversion of a mill), and which, with the limitation by which the proposition was guarded ("this doctrine would not affect cases of indemnity where one man employed another to do acts not unlawful in themselves for the purpose of asserting a right"), was approved by BEST, C.J., and the other judges of the Court of Common Pleas in *Adamson v. Jervis* (1827), 4 Bing. 66 (a case of fraudulent misrepresentation of authority), and by BRAMWELL, L.J., at p. 377, and KELLY, C.B., at p. 379, of *Horwell v. London General Omnibus Co.* (1877), 2 Ex. D. 365, C. A. (a case of negligence), and, though it never had any place either in Roman or in Scotch law, and ought not to be extended—see *Palmer v. Wick*, [1894] A. C. 318, H. L.—is, nevertheless, still part of the law of England: see *The Englishman and The Australia*, [1895] P. 212 (a case of collision at sea), *per* BRUCE, J., at pp. 216–219. As to the Roman law on this subject, see App. C. Sect. 2, Sub-s. (5), *post*; as to the Scotch law, see App. D, Sect. 1, *post*. As to the statutory right of directors and persons issuing prospectuses of companies to contribution and indemnity in respect of compensation paid for misrepresentation in such prospectuses, see Ch. XIII, Sect. 1, Sub-s. (7).

(*a*) See generally the cases cited in this Section.

(*b*) See such of the cases cited in this Section as relate to express, and not implied, authority, such as *Ludgater v. Love* (1881), 44 L. T. 694, C. A., where, on both trials of the action, it was left to the jury to say whether the defendant had authorized his son to make the representation he had made.

authority is alleged, though, subject as above (c), it is a question of fact what the nature and terms of the employment or business in the particular case were, and what were the duties of the alleged agent (d), it is a question of law whether, from the proved or admitted facts in relation to these matters, the authority is to be implied (e), and, where the terms of the employment are wholly contained in any document, it is for the court to construe that document.

SECT. 2. THE REPRESENTEE.

174. In order to sustain any action or proceeding in respect of misrepresentation, it is as essential to show that the representation was made to one whom the law deems to be a representee, as it is to prove that it was made by one whom the law deems to be a representor. Having, then, discussed who is legally accountable as a representor, it remains to consider what persons may in law claim relief as representees; for, in the case of both representor and representee, it is not only the individuals who physically make, and directly receive, the communication, who are deemed to answer to these respective descriptions.

175. A representee is described in Article 1 of the Code as including any person either to whom the representation is directly and immediately made, or to whose notice, though not so made to him, it is intended to come. This intention may be proved to have been expressed by the representor, when making the representation, to the person to whom he made it in the first instance, as when he requested or authorized that person to pass it on or repeat it to the person whom it was intended to reach, who then becomes the representee. Or such intention may be inferred from the

(c) *Thorne v. Heard & Marsh*, [1895] A. C. 495, H. L., *per* Lord HERSCHELL, L.C., at p. 502: "it appears to me perfectly clear that, in order to charge any person with a fraud which has not been personally committed by him, the agent who has committed the fraud must have committed it while acting within the scope of his authority, while doing something and purporting to do something on behalf of the principal . . . if the person, although he has been employed as agent, is not, in the transaction which is the wrongful act, acting for or purporting to be acting for the principal, it seems to me impossible to treat that as the frauds of the principal. Now, in this case there is no pretence for saying"—(this expression may be regarded as equivalent to "there is no evidence")—"that in what he did that was fraudulent . . . Searle was acting for the respondents."

(d) In *Newlands v. National Employers' Accident Association* (1885), 54 L. J. (Q. B.) 428, C. A., it was pointed out that no "practice or regular course of business" of the society had been proved by evidence, which would support the averment that its secretary had authority to make a representation of the kind which he in fact made (implying, that the issue was one of fact, on which evidence was receivable), and that, as there was no such evidence, it was a conclusion of law that no implication of authority could be made (*per* BRETT, M.R., at p. 430, and BOWEN, L.J., at p. 431). See also *British Mutual Banking Co. v. Charnwood Forest Railway Co.* (1887), 18 Q. B. D. 714, C. A., where it had been left to the jury at the trial to say whether the secretary of the company had been held out as a person to answer inquiries, and the jury had answered in the affirmative, but the C. A. held that from the whole of the facts proved and found no authority could be inferred in law (*per* Lord ESHER, M.R., at pp. 716, 717, and BOWEN, L.J., at pp. 717-719).

(e) See pp. 415, 416 of *Mackay v. Commercial Bank of New Brunswick* (1874), L. R. 5 P. C. 394, and the two authorities cited in the last note.

representor's proved knowledge, when making the representation, that any statement he made as to the subject-matter of the transaction would be so passed on, and from all the circumstances of the case. It results from this general rule that there are three classes of persons to whom a representation may be deemed to have been made: (i) the person to whom it was physically and directly made, or his principal, or partner; (ii) a specific person, not being the person to whom the representation was immediately made, nor his principal or partner, but whom the representor, either expressly or presumptively, intended it to reach and affect; and (iii) any member of the public, or of a section or class of the community, who acts upon any representation addressed in the first instance not to any specific individual, but to such public, or section or class, and who accordingly thereupon becomes a representee (*f*).

Sub-sect. (1). The Person to whom the Representation is made, or his Principal or Partner.

176. The first of the three classes of representee above referred to is an obvious one. If the representation is made to A. solely and directly, with no other person in contemplation, A. is plainly the sole representee. It is equally manifest that, if it is made by the representor to A., with knowledge that A. is merely the agent of B. to receive the communication, or the agent for that purpose of some one who, though not disclosed at the time, afterwards turns out to be B., or if without there being any such knowledge on the part of the representor, A. is in fact for that purpose agent of B. who afterwards intervenes as principal, and enters into a contract with the representor on the faith of the representation,—then, in any of such cases, the representee, and the only representee, is B., and the person to whom the statement is immediately and physically made is merely the agent to convey it to such representee, or the medium or messenger through whom the transmission is effected, just as if he were a telegraphic or telephonic instrument (*g*). On the other hand, the representation may be made to B. through A., but still with the intention that A. shall also be influenced by it, and act upon it, or with the knowledge that B. is A.'s partner or joint contractor or associated with him in the business in

(*f*) *Swift v. Winterbotham* (1873), L. R. 8 Q. B. 244, where COCKBURN, C.J., at p. 253, includes the three classes mentioned in the text in his statement of the rule: "it is now well established that, in order to enable a person injured by a false representation to sue for damages, it is not necessary that the representation should be made directly; it is sufficient if the representation is made to a third person to be communicated to the plaintiff, or to be communicated to a class of persons of whom the plaintiff is one, or even if it is made to the public generally, with a view to its being acted on, and the plaintiff, as one of the public acts on it, and suffers damage thereby." The soundness of the above proposition was in no way impugned or affected by the Exchequer Chamber, when, *sub nom. Swift v. Jewsbury* (1874), L. R. 9 Q. B. 301, Exch. Ch., they reversed the actual decision in this case, on the ground that the alleged representor could not be so deemed in law.

(*g*) For instance, in *Haycraft v. Creasy* (1801), 2 East, 92, the defendant made the misrepresentation to the plaintiff's son, and afterwards to his brother, in answer to inquiries made by these two persons professedly on behalf of the plaintiff; and in *Gilbert v. Endean* (1878), 9 C. D. 259, C. A., the solicitor of the one party made the representation to the solicitor of the other.

question, or is about to be so associated, in either of which cases both A. and B. may become the representees, if both act upon the representation (*h*).

Sub-sect. (2). Any Person to whom the Representor actually or presumptively intended the Representation to be passed on.

177. But, further, even where B. is not known or believed to be, and is not in fact, the principal or partner of, or otherwise associated with A., the representor may yet either accompany his representation to A. with a direct instruction or authority to repeat it to B., or with an implied intent that it shall come to the notice of B., and be acted on by him—such implication being made from the representor's express declarations or admissions, or from his making the representation with knowledge that A. intends to pass it on to B., for him to act upon (*i*), or with knowledge subsequently acquired, but before B. has acted upon it, that A. has so passed it on to B. for that purpose (*k*). In any such case B. is deemed to be the representee, if and as soon as the representation has been so passed on to him, and he has altered his position on the faith of it, whether A. is or is not also to be accounted a representee, which depends upon the question whether he was intended *solely* as the living medium of communication, or as a person to be himself influenced by the statement, as well as the transmitter of the influence to B., which again depends upon all the circumstances of the individual case (*l*). Whenever such intention

(*h*) Thus, in cases of marine insurance, "a representation to the first underwriter extends to the others" who come in afterwards, *per* Lord MANSFIELD, C.J., at p. 306 of *Barber v. Fletcher* (1779), 1 Dougl. 305.

(*i*) This was the case in *Levy v. Langridge* (1837) 2 M. & W. 519, in Error, *Langridge v. Levy* (1838), 4 M. & W. 337, Exch. Ch., where the plaintiff's father, to whom the representation (that the gun sold had been made by Nock, and was a good and safe gun) had been addressed, expressly told the defendant that the gun was intended for the use of himself and his sons (see pp. 520, 521, and 530, 531, of the report of the case in the Court of Exchequer), and it was held that the plaintiff, who lost his hand in consequence of the gun exploding, was entitled to recover. Similarly, in *Swift v. Winterbotham* (1873), L. R. 8 Q. B. 244, the nature of bank business, as proved by evidence at the trial, was such that it must have been "within the contemplation of the defendants when the representation was made, that it would or might be communicated to the customer of the bank on whose behalf it was sought." Though the decision was reversed by the Exchequer Chamber, the reversal was on grounds which left the above statement quite unimpeached. Cp. *Parsons v. Barclay & Co.* (1910), 103 L. T. 196, C. A.

(*k*) As in *Pilmore v. Hood* (1838), 5 Bing. N. C. 97, where the defendant, in order to induce one Bowman to take a lease of a public house, had told him a falsehood, and afterwards, Bowman being unable to complete, and the defendant accepting the plaintiff as his lessee in his stead, Bowman, to the defendant's knowledge, passed on the fraudulent representation to the plaintiff, which was held enough to entitle the latter to recover, as the representee (*per* TINDAL, C.J., at pp. 105, 106, and BOSANQUET, J., at pp. 108, 109).

(*l*) To take an illustration from a familiar type of case, A. may hand or address a prospectus, circular, or announcement of any kind, to B. (i) with express instructions not to communicate it to any one else, but to regard it as private and personal, or (ii) for the sole purpose of his passing it on, as a mere distributing agent, to C., or a class of which C. is one, or (iii) with the intention that B. shall act upon it, and also pass it on to his friends, of whom C. is one, or to a class to which both B. and C. belong, as in *Levy v. Langridge*, *sup.* In case (i), B. is ordinarily held to be the sole representee but not necessarily so, if the circumstances of the case, in their entirety, point to a different conclusion, as *e.g.* in the case cited in note (*t*), *post*; with which contrast

is neither established directly by evidence, nor as an implication from the proved or admitted facts, B. is not in law the representee (*m*) ; A., of course, is, but, in most of the cases which raise the question, he fails on the ground that he was not the person injured (*n*).

178. In Lord HATHERLEY's statement of the rules relating to representations made under circumstances of the character in question (*o*), the situation is described as one in which A. makes the representation to B., whereby a third person intended to act, and in fact acting on it, is injured or damaged, and acquires rights in virtue of such intended injury or damage. But, surely, it is far simpler, and also, perhaps, more exact, to call this so-called "third person" the representee, or, at all events, a representee, and to describe the person to whom the representation is immediately and physically made as the "third person," as COCKBURN, C.J., did (*p*), or, at least as the medium of communication, who may, or may not, happen to be also a representee ; for it is primarily in virtue of the statement having been, by implication of law, made to *him*, that the miscalled "third person" satisfies the first condition precedent to a cause of action for misrepresentation, though of course in this, as in any other case of the like character, there are other conditions also to be satisfied, such as alteration of position, and (when the action is one of deceit, but not otherwise) damage.

Sub-sect. (3). A Member of a Class of Persons to whom the Representation is addressed.

179. In a certain class of action on contract, the futile objection has frequently been raised that a man "cannot contract with the world," to which the obvious answer is that, assuming this to be so, it is nevertheless true that you can make a proposal to the public, or to a class of the community, or to a body of undesignated persons, which proposal any individual member of the public, or of the class or body in question, by word or act, may accept, and that, on his doing so, a valid contract is created between him and the proposer (*q*) ; and, on the same principle, a representation, no less than an offer, may be made to a class, with the object of inducing as many members of it as possible to take a certain course, whereupon any individual belonging to the class who can prove that he

Edinburgh United Breweries, Ltd. v. Molleson, [1894] A. C. 96, H. L., where it was not alleged or proved that the misrepresentation made to Dunn was intended to be, or was in fact, "passed on" to the pursuer company, and where it was clear that whatever implied representation Dunn made to the company was not a transmitted, but an independent and different representation (*per* Lord HERSCHELL, L.C., at pp. 109-112) ; in case (ii), C. is the sole representee, as in *Gerhard v. Bates*, as to which see note (*a*), *post* ; in case (iii), both B. and C. are representees.

(*m*) See the cases cited in the notes to §§ 180-183, *inf*.

(*n*) See the same cases.

(*o*) Cited in § 149, *ante*.

(*p*) See his observations cited in note (*f*), *ante*.

(*q*) *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256, C. A., *per* LINDLEY, L.J., at p. 262. BOWEN, L.J., at pp. 268, 269, and A. L. SMITH, L.J., at p. 274.

in fact acted upon the representation so made, acquires rights (all other ingredients in the particular cause of action being also established) against the representor (*r*) ; for, as has been well said, " it is not a bad rule that any one who makes a fraudulent representation, which is intended to be generally circulated, should be liable to any person injured by acting upon it, however remote the consequences may be " (*s*). Consequently, any person who by a prospectus, circular, report, or other similar document addressed to the public, is induced to subscribe for shares or debentures in a public undertaking (*t*), or by any advertisement or like document, issued when the company is a going concern, is induced to purchase such shares or debentures in the market (*u*), or by any published misrepresentation is induced to do either or both of such things, if the misrepresentation

(*r*) In fact, any person whose practice or profession depends, for its success, upon delusive statements, prefers to operate upon the multitude, rather than upon specific persons, whether the statements are addressed orally to an assembly, or in print, through newspapers. It was wisely noted of old by Herodotus that it is always easier to mislead an *ὄχλος* than an individual, and, in more modern times (according to Josiah Tucker, Dean of Gloucester, *Treatise Concerning Civil Government*), " how much easier it is to deceive mankind than to undeceive them," was a favourite motto of Earl Chesterfield." Every mountebank, juggler, showman, quack, and swindler, whose business it is to palm off nostrums and tricks upon the public, knows how " schwarmerei " rules and maddens the mob, and how powerfully the imitative instinct in human nature lends aid to the seductions of a newspaper " boom." Any lie which might be subjected to more or less searching criticism by detached individuals is swallowed readily by those same persons *en masse*; for, as COLERIDGE remarked (*Lay Sermons*, ed. Derwent Coleridge, 1852), " the natural generosity of the human heart which makes it an effort to doubt, the confidence which apparent courage conveys, and the contagion of animal enthusiasm, will insure the belief " desired (p. 167), and " mobs have no memories " (p. 168). This has been the history of every manufactured mania from the South Sea Bubble to the South African Mines craze.

(*s*) *Per* BRAMWELL, B., at p. 548 of *Bedford v. Bagshaw* (1859), 4 H. & N. 538.

(*t*) *Re Royal British Bank, Ex parte Brockwell* (1857), 26 L. J. (CH.) 855, where the plaintiff took three shares in the Bank issued under a second charter, which they had recently acquired, on the faith of a half-yearly report, and it was held, *per* KINDERSLEY, V.-C., at p. 862, that " the representation was intended not only to delude existing shareholders, but to induce the public to take the new shares just issued," and none the less because the report was headed, " For the use of the proprietors only."

(*u*) *R. v. De Berenger* (1814), 3 M. & S. 67, where Lord ELLENBOROUGH, C.J., at p. 73, described the offence charged (spreading rumours of the death of Napoleon, and the imminent conclusion of peace) as " a fraud levelled against all the public " ; but see Sect. 3, as to the doubts which have been expressed by high authority whether any of such persons would have had a civil remedy against De Berenger : *Shrewsbury v. Blount* (1841), 2 M. & G. 475, where, as the jury found, the plaintiff had been induced to purchase shares by misrepresentations contained in the company's scrip-certificates and advertisements ; *Gerhard v. Bates* (1853), 2 E. & B. 476, where the second count of the declaration alleged that the defendant had made fraudulent misrepresentations to the *Stock Exchange*, " with intent to injure and deceive the public," and that " the defendant, by means of the said false and fraudulent representations, induced the plaintiff to become the purchaser and bearer of " the shares in question ; and it was held on demurrer that this count was good, or, in other words, that the plaintiff had sufficiently averred that he was a representee (whatever difficulties he might afterwards encounter *in proof*, having regard to the fact that the document said to have contained the misrepresentations was a prospectus) ; *Scott v. Dixon* (1859), 29 L. J. (EXCH.) 62 n., where copies of a report containing a false statement that profits had been earned by a banking company which were available for a dividend, and that the shares were a safe investment, were left by the directors at the bank premises for distribution to any broker or other member of the public who came to make inquiries, and it was held that though the report was originally issued to the shareholders, who

was intended or calculated to bring about either or both of such results (*x*), is, immediately on so acting, deemed a representee. So also, any member of the public to whom a negotiable instrument “may be offered in the course of circulation” (*y*), or to whom an advertisement offering a situation is published (*z*), or who is invited by public announcement to attend an auction sale (*a*), or to whom a time-table of trains is issued by a railway company (*b*), is in like manner, and under the like conditions, entitled to all the rights which any person might claim to whom the representation had been made directly and individually.

Sub-sect. (4). Burden of Proof and Questions of Law and Fact.

180. The question whether the party claiming relief in respect of any misrepresentation was, or was not, the representee, or one of the representees, is a question of fact, and the subject, therefore, of evidence (*c*); but the question whether there is any evidence of this fact, and also the question whether, on the proved and admitted facts of the case, the representation must, or must not, be deemed to have been made to the alleged representee, are questions of law (*d*).

were primarily the representees, it was also addressed, in the manner described, to any member of the public; *R. v. Aspinall* (1876), 2 Q. B. D. 48, C. A., a criminal case, but, according to BRETT, J.A., at pp. 57, 59, the same rules as to allegation and proof apply to both civil and criminal proceedings for fraudulent misrepresentation made to the public; and *Scott v. Brown, Doering & Co.*, [1892] 2 Q. B. 724, C. A., where, by acts and conduct (“rigging the market”), the parties had made fraudulent misrepresentations as to the value of the shares to induce members of the public to purchase in the market.

(*x*) In *Andrews v. Mockford*, [1896] 1 Q. B. 372, C. A., where it was held that the prospectus issued by the directors, followed by a fabricated telegram, purporting to come from the mine, were intended to produce conjointly a double effect, viz. on the one hand, to induce subscriptions for the shares by “strengthening” the prospectus, and, on the other, to induce purchases in the market.

(*y*) *Polhill v. Walter* (1832), 3 B. & Ad. 114, *per Cur.* at pp. 123, 124, where it was held that the statement by a man that he has authority to accept a bill of exchange “is made to all to whom the bill may be offered in the course of circulation, and is in fact intended to be made to all, and the plaintiff is one of them”; *West London Commercial Bank v. Kitson* (1884), 13 Q. B. D. 360, C. A., where a similar representation was held to have been made to any member of the class of persons who might discount the bill (*per* BRETT, M.R., at pp. 361, 362).

(*z*) *R. v. Silverlock*, [1894] 2 Q. B. 766, where a count in an indictment was held good, which averred that an advertisement for a housekeeper was a false pretence to all his Majesty’s subjects, by means of which “the accused” did unlawfully obtain from the prosecutrix certain property.

(*a*) *Robinson v. Wall* (1847), 2 Ph. 372, *per* Lord COTTENHAM, L.C., at pp. 374, 375, and *cp.* generally the cases cited in Ch. XIII, Sect. 2.

(*b*) *Denton v. G. N. Ry. Co.* (1856), 5 E. & B. 860.

(*c*) In *Swift v. Winterbotham* (1873), L. R. 8 Q. B. 244, evidence was given of the practice of one bank making communications to another bank, for the purpose of their being transmitted to a customer of such other bank; and, in *Bedford v. Bagshaw* (1859), 4 H. & N. 538, there was similar evidence as to the practice of the Stock Exchange Committee, and rules of the Stock Exchange (see p. 545).

(*d*) For instance, in *Gerhard v. Bates* (1853), 2 E. & B. 476, which was a demurrer, *Bedford v. Bagshaw, sup.*, *Swift v. Winterbotham, sup.*, *R. v. Aspinall* (1876), 2 Q. B. D. 48, C. A.; *Salamon v. Warner* (1891), 65 L. T. 132, C. A.; *R. v. Silverlock*, [1894] 2 Q. B. 766; *Andrews v. Mockford*, [1896] 1 Q. B. 372, C. A., and in many others of the cases cited in this Section, the question of law was, whether the facts alleged in the declaration, statement of claim, or indictment, or proved at the trial, sufficiently

181. It is incumbent on the party who asserts a right to relief in respect of a misrepresentation to allege (*e*), and, having so alleged, to prove, that he was the representee, or one of the representees. Where the representation was made, if at all, directly and immediately to the alleged representee, little or no difficulty is experienced, as a rule, in discharging the burden. It is when the communication is supposed to have been made in the first instance, not to the alleged representee, but to a third person, with intent that it should be “passed on,” or to have been addressed to a class of whom the alleged representee claims to be one, that nice questions arise, and the burden may be peculiarly heavy (*f*). But, whether onerous or light, the duty of sustaining it is clear, and in every case where the evidence, or the proper inference to be drawn from it, was not adequate for the purpose, the party setting up the misrepresentation has been held disentitled to relief.

182. Thus, in reference to the case of a specific individual whom the representor is alleged to have intended his representation to reach and influence and mislead, though made directly to a third person, the allegation requires very cogent and precise proof, which in many cases has not been forthcoming, whereupon either the fact has been found against the alleged representee, or, if found in his favour, the court has held that there was no evidence to justify such a finding (*g*).

disclosed a cause of action, or offence, that is, constituted *any* evidence that the plaintiff was the person, or one of the persons, to whom the false representation or pretence had been made.

(*e*) Amongst the other omissions which made a count of the declaration in *Behn v. Kemble* (1859), 7 C. B. (N. S.) 260, bad in law, was the omission “to aver that any representation was made to the plaintiff.”

(*f*) Lord HATHERLEY (then WOOD, V.-C.) must have been intending to refer to the greater precision and difficulty of proof in cases of transmitted representation, than in those where the representation was direct, when drawing the distinction which he apparently did between the *alleganda et probanda* in his first rule and the necessary elements of proof in his second and third rules,—a distinction which (except as here explained) there is some reason to think unjustified : see § 149, *ante*.

(*g*) Thus in *Longmeid v. Holliday* (1851), 6 Exch. 761, the misrepresentation as to the lamp which injured the plaintiff was made not to her, but to her husband, who had not brought to the notice of the defendant, nor was the defendant otherwise proved to have known, that it was intended for the plaintiff’s use, and it was accordingly held that the plaintiff had not proved that she was the representee, or a representee (*per* PARKE, B., delivering the judgment of the court at p. 776). This case may be usefully contrasted with *Langridge v. Levy*, cited in note (*i*) to § 177, *ante*, where the father of the plaintiff had expressly informed the representor that the gun was intended for the plaintiff’s use, which of course makes all the difference, for, as was afterwards pointed out by the court at pp. 1052, 1053 of *Blakemore v. Bristol and Exeter Railway Co.* (1858), 8 E. & B. 1035, “if in that case a friend of the father or son, by their permission, had used the gun and sustained the accident, we apprehend . . . no action could have been maintained by him,” and still less, as observed by WOOD, V.-C., at pp. 17, 18, 24, of *Barry v. Croskey* (1861), 2 J. & H. 1, would a stranger, finding the gun, and using it without permission, and sustaining injury in consequence, have had any cause of action as a representee. See also *Collins v. Cave* (1860), 6 H. & N. 131, Exch. Ch., at p. 134 (“it is alleged that the representation was made with a view to induce Charles Collins”—not the plaintiff, who was William Collins—“. . . we do not see that the damage which the plaintiff alleges himself to have sustained arose from the acts of the defendant”); and *Le Lievre v. Gould*, [1893] 1 Q. B. 491, C. A., wherein it was held that a mortgagor’s surveyor who gave his employer a false certificate of the value of certain property, did not thereby make a representation

183. Again, where the representation is made to a class of which the alleged representee claims to be a member, difficult problems frequently present themselves. In all such cases "there must always be this evidence against the person to be charged, namely, that the plaintiff was one of the persons to whom he contemplated that the representation should be made" (*h*). And, further, unless there is direct evidence of the representor's declarations and admissions of his intention on that behalf, which is not often available, the nature of the representation must be carefully examined; for, on such examination, in the light of not only any evidence which is necessary and admissible but also such ordinary practices in the affairs of life as the courts will take judicial notice of (*i*), it is often found that, though a class of persons was obviously intended to be deceived thereby, the class in question was not the class to which the alleged representee belongs, in which case the burden of proof is not discharged; as, for instance, where a plaintiff claims to have been induced to purchase shares in the market by a prospectus or other document the primary office and nature of which is to induce, not purchases, but applications for allotment (*k*), or, conversely, to subscribe for shares by a representation obviously intended

to the mortgagee, who was the plaintiff, because such mortgagee was neither the person, nor a member of any class, to whom the defendant expressly or inferentially intended it to be shown, and it was held that the decision of (HITTY, J., to the contrary effect, in *Cann v. Willson* (1888), 39 C. D. 39 had been impliedly overruled by *Derry v. Peek* (1889), 14 App. Cas. 337, H. L. (see the judgments of Lord ESHER, M.R., at pp. 497, 498, and of BOWEN, L.J., at p. 499, and again at p. 502, where he remarks that a piece of paper, with a statement upon it, is not like a gun, or a dangerous instrument, which a man leaves about at his peril, or, in other words, that when A. makes a representation to B. he is not thereby to be *presumed* to be making it to any one else, certainly not *urbi et orbi*, and, if such an allegation is made, it must be proved by strict evidence, of which there was none in the case before the court). The same kind of principle is applied to the "passing on" of a slanderous publication: see the author's *Code of the Law of Actionable Defamation*, Article 6 (*c*) and (*d*).

(*h*) *Bedford v. Bagshaw* (1859), 4 H. & N. 538, *per* POLLOCK, C.B., at p. 548. Though it has been doubted—see Sect. 3, *inf.*—whether the rule so stated was correctly applied to the facts of the case, no one has doubted the soundness of the rule itself. Numerous illustrations of failures of the alleged representee to prove that he belonged to a class whom the representor intended to influence are collected in the notes to § 118, *ante*, where the question of inducement is being dealt with. The reader is referred to those decisions, which are equally relevant to the topic now under discussion.

(*i*) *Polhill v. Walter* (1832), 3 B. & Ad. 114 (*per Cur.* at p. 124): "the plaintiff must be taken to have intended that all such persons should act upon the faith of that representation, because that, in the ordinary course of business, is its natural and necessary result."

(*k*) Ordinarily, the function of a prospectus is exhausted when the application-lists are closed, and subscriptions have, or have not, been secured by the representations contained therein, and a subsequent purchaser of shares in the market cannot, without cogent and express evidence, be heard to say that the prospectus formed an inducement to him to effect such purchase, or contained any representation addressed to him with that object, or otherwise: *Peck v. Gurney* (1873), L. R. 6 H. L. 377 (*per* Lord CHELMSFORD at pp. 395–400, and Lord CAIRNS at pp. 410–413); and *Salaman v. Warner* (1891), 65 L. T. 142, C. A. But it must be remembered that nothing was decided in the above cases beyond this, that a connection between the prospectus and the purchase by the alleged representee, who claims in that character, will not be presumed, but must be proved. Where such connection is distinctly alleged, as it was in *Gerhard v. Bates* (1853), 2 E. & B. 476, or clearly established by evidence, as it was in *Andrews v. Mockford*, [1896] 1 Q. B. 372, C. A., the burden of allegation in the one case, and of proof in the other, is discharged.

to induce only a purchase (*l*); or where a member of the public, as such, claims to have sustained injury in consequence of an implied misrepresentation addressed to a more limited class to which he does not belong (*m*); or, where a company complains of its agents' fraudulent statements not to it, but to the public (*n*).

SECT. 3. NOTE ON THE CASES OF *R. v. DE BERENGER*, *BAGSHAW v. SEYMOUR*, AND *BEDFORD v. BAGSHAW*.

184. These three cases have a bearing on the question whether a member of the public who, as such, has dealt in shares of a company, or public funds, to which a fictitious value has been attributed by fraudulent misrepresentation, has a claim as representee. They have provoked much criticism and doubt, and were decided in 1814, 1856, and 1859 respectively. It is proposed to consider them in order of date.

185. The first of the three is *R. v. De Berenger* (*o*), in which the spreading of rumours by De Berenger and seven others to the effect that Napoleon had been killed, and that peace between the two countries was imminent, was charged as, and found by the jury and held (on motion to arrest judgment) to be, a criminal offence, inasmuch as "it strikes at the price of a vendible commodity in the market, and if it gives it a fictitious price, by means of false rumours, it is a fraud levelled against all the public, for it is against all such as may possibly have anything to do with the funds on that particular day (*p*); its object was to injure all those who should

(*l*) *Re National Patent Steam Fuel Co., Ex parte Worth* (1859), 28 L. J. (CH.) 589, where it was held that no representation had been made to the plaintiff in the character of an applicant for allotment of shares, in which character he claimed, but only a representation to him as a contemplated purchaser, from a director, of a particular block of shares.

(*m*) In *Blakemore v. Bristol and Exeter Railway Co.* (1858), 8 E. & B. 1035, the defendants, in providing a crane for the unloading of goods by consignees, were held to have made an implied representation (by acts and conduct) to the class of consignees, and their employees, but not to the public at large. One, Harvey, was a consignee, and, with two assistants in his regular employ, used the crane for the above purpose, and, in so doing, called in the plaintiff, a member of the public, to help his assistants, and the plaintiff, when so engaged, was injured, and sued on the theory and averment that the defendants had "professed to the public" that the crane was safe: but the court held that the only "profession" made was to Harvey, as a consignee, and the two assistants he brought with him, and that the burden was on the plaintiff to show that the defendants knew, or *must* have known, that Harvey would require further assistance from outside, and that, this burden not having been discharged, the action failed. In this connection the effect and meaning, and also the soundness, of three decisions, *R. v. De Berenger* (1814), 3 M. & S. 67, *Bagshaw v. Seymour* (1856), 18 C. B. 903, and *Bedford v. Bagshaw* (1859), 4 H. & N. 538, has been much canvassed. These cases are reserved for separate consideration in Sect. 3, *inf.*

(*n*) *Vigers v. Pike* (1842), 8 Cl. & Fin. 562, *per* Lord COTTENHAM, L.C., at pp. 646, 647; *Overend and Gurney Co. v. Gibbs* (1872), L. R. 5 H. L. 480, *per* Lord CHELMSFORD, at p. 501; and *Re Ambrose Lake Tin and Copper Co., Ex parte Taylor, Ex parte Moss* (1880), 14 C. D. 390, C. A., *per* BRETT, L.J., at p. 397, and COTTON, L.J., at p. 399.

(*o*) (1814), 3 M. & S. 67.

(*p*) *Ibid.*, *per* Lord ELLENBOROUGH, C.J., at pp. 72, 73.

become purchasers on that day," though not any "individuals in particular" (q), or, in other words, "to create a temporary rise in the funds without any foundation, the necessary consequence of which must be to prejudice all those who become purchasers during the period of that fluctuation" (r). It was distinctly *not* put that the raising of the price of public funds is *per se* a crime, public funds being regarded for that purpose as an "article of necessity," no less than bread, water, and the like (s). This is the view of the effect of the decision which was taken by BRETT, J.A., in a later case, who there observed that in *R. v. De Berenger* "the conspiracy was held to be criminal, not because the article to be dealt in was the public funds, but because the public funds was a *vendible commodity*" (t). This being so, one would suppose that any member of the public who bought public funds on the day in question at a price artificially enhanced by the false rumours could at least claim to be one of the persons injured by the wrongful act of De Berenger and his associates, and recover damages to the extent of such artificial increase, however difficult it might be to prove, in any particular case, either the causal connection between the damage and the wrong, or the amount of the damage. But, according to Lord HATHERLEY (u) and RIGBY, L.J. (x), this is precisely what such a purchasing member of the public could not have done. The observations of WOOD, V.-C., have already been set out (y). What RIGBY, L.J., said was: "a man acting upon that might have done many things besides buying public funds. He might have bought French funds, or bought land in France. It seems to me that the principle required would be this—that when a man tells a lie, he is responsible for every sort of damage that accrues to any person, wherever he may be, who hears of the lie, and takes action upon it, whatever the nature of that action may be,"—which suggested rule he characterizes as "extravagant" and wholly inadmissible. The above expressions of opinion purport to have had immediate relation to the question of damage, but it is obvious that they might easily be thrown into the form of a proposition that no member of the public under the circumstances stated could claim to be a representee—a proposition, indeed, which, in that form, would perhaps meet with a readier and more unqualified assent than when applied to the question of damage.

186. *Bagshaw v. Seymour* (z), though in a purely technical sense a decision of the House of Lords, ought never to have been reported, or cited in argument, much less relied upon, as it was in *Bedford v. Bagshaw* (a), as an authority supporting a judgment. Its meagre annals are as follows: Seymour sued Bagshaw in respect of the same cause of action as that in *Bedford*

(q) *Ibid.*, per LE BLANC, J., at p. 74.

(r) *Ibid.*, per BAILEY, J., at p. 75. Cp. DAMPIER, J., at p. 76.

(s) *Ibid.* See LE BLANC, J.'s, observations at pp. 73, 74.

(t) At p. 60 of *R. v. Aspinall* (1876), 2 Q. B. D. 48, C. A.

(u) Then WOOD, V.-C., at pp. 18, 19 of *Barry v. Croskey* (1861), 2 J. & H. 1.

(x) At pp. 384, 385 of *Andrews v. Mockford*, [1896] 1 Q. B. 372, C. A.

(y) In note (m) to § 146, *ante*.

(z) (1856), 18 C. B. 903.

(a) (1859), 4 H. & N. 538.

v. Bagshaw (a). He succeeded at the trial before JERVIS, C.J., whereupon Bagshaw, on a bill of exceptions to the judge's ruling, took the case to the Exchequer Chamber (*b*), where, if the report is correct (*c*), the following extraordinary performance, or exhibition, took place: "by consent of counsel, for the purpose of going at once to the House of Lords, judgment of affirmance was pronounced, without hearing." This was odd enough, but a still stranger thing was to follow. On the case coming on for hearing before the tribunal of ultimate resort, "in June, 1858, the judgment was affirmed in the House of Lords *without argument*" (*d*), since Bagshaw's counsel, who do not appear to have "added anything unto him in conference," advocacy, or otherwise, declined to open the appeal. If this was the history of the case, one may share the amazement afterwards expressed by Lord CHELMSFORD, that it should have been (as it undoubtedly was) "considered as a conclusive authority by the judge who decided *Bedford v. Bagshaw*" (*e*). The same curious course was adopted, before the Exchequer Chamber, in *Bagshaw v. Lane* (*f*), but whether this case also went to the House of Lords or not we are not told.

187. It is necessary, therefore, to examine whether *Bedford v. Bagshaw* (*g*) was correctly decided; for, if it was, the decision in *Bagshaw v. Seymour*, though having no authority in itself, derives authority from the later case, where the decision was undoubtedly given after full and serious argument. In the later case, as in the earlier, Bagshaw, who was chairman of the board of directors of a certain company, was alleged to have falsely represented to the Committee of the Stock Exchange that the requisite proportion of the company's share capital had been subscribed in cash, which was a condition precedent to the obtaining of an official quotation on the Stock Exchange; so that any one apprised of such quotation (so it was argued) would be led to believe that the necessary subscription had in fact been made, and this was held to be an implied representation not only to the members of the Stock Exchange Committee directly, but also indirectly and inferentially, to "all persons buying shares on the Stock Exchange," who "must be considered as persons to whom it was contemplated that the representation would be made" (*h*). It is to be observed that the Chief Baron had, before applying it to the particular circumstances, first laid down the general rule to be followed in all such cases in carefully guarded

(*b*) Reported *sub nom.* *Bagshaw v. Seymour* (1856), 18 C. B. 903, and no longer as *Seymour v. Bagshaw*, Bagshaw, though defendant in the action, having now become plaintiff in Error.

(*c*) BRAMWELL, B., at pp. 547, 548 of *Bedford v. Bagshaw, sup.*, said that he was in a position, apparently from personal knowledge as one of the members of the court, to state that the report, if it was meant thereby that the case passed *sub silentio* through the Exchequer Chamber, was incorrect. The two statements may, however, be reconciled by supposing that, though not argued by counsel, the questions arising were discussed by the judges *inter se*.

(*d*) This is the reporter's note at p. 547 of *Bedford v. Bagshaw, sup.*

(*e*) At pp. 396, 397 of *Peck v. Gurney* (1873), L. R. 6 H. L. 377.

(*f*) (1856), 18 C. B. 904.

(*g*) (1859), 4 H. & N. 538.

(*h*) *Per* POLLOCK, C.B., at p. 548.

terms (*i*), which have already been cited (*k*), and which were pointed and emphasized by his further remark that he was "not prepared to lay down as a general rule that, if a person makes a false representation, every one to whom it is repeated, and who acts upon it, may sue him," and by the illustration given by BRAMWELL, B.: "it would be a strong thing to hold that if a man makes a verbal untrue statement to any person, as for instance, that the shares in a particular company are a valuable security, if that person buys and recommends his friends to buy, that he is to be liable to any one who buys on the faith of that representation" (*l*). It was then held by the Court of Exchequer that the facts of the case before them satisfied the conditions specified in the rule, and were not like those of the illustration, which failed to do so. From this decision, so far as regards the particular application of the rule in that case, not the rule itself, and also from the result of *Bagshaw v. Seymour*, Lord CHELMSFORD, in *Peek v. Gurney* (*m*), expressed the strongest possible dissent ("the decisions, and the grounds on which they proceeded, appear to me to be extraordinary, and I cannot bring my mind to agree with them"). But the statement in the headnote that the House of Lords overruled these two cases is absolutely incorrect. An authority can only be overruled expressly or impliedly: expressly, when the court as a whole, or the majority of its members, in their judgments pronounce that it is no longer law; impliedly, when a principle of law is enunciated, or an application of a rule to precisely similar circumstances, is made by such court or majority, which principle, or application (as the case may be), is wholly inconsistent with the principle enunciated, or the application made, in the case under review. None of these things happened in *Peek v. Gurney*. It was not necessary to the decision in that case that *Bedford v. Bagshaw* should cease to be law, nor did the House or any of the learned lords purport to overrule it, or (except Lord CHELMSFORD) express any opinion whatever as to its correctness or otherwise. In particular, the silence of Lord CAIRNS on the subject is significant. We are therefore still at liberty to regard the decisions in question as sound; and so they seem to have been subsequently thought by eminent authorities, judging from the observations made by BRETT, J.A., (*n*) and AMPHLETT, J.A. (*o*), in a case where the circumstances were precisely the same (*p*), and from those of A. L. SMITH, L.J., in a still more recent case (*q*).

(*i*) *Ibid.*

(*k*) In § 183, *ante*.

(*l*) Both the further observation of POLLOCK, C.B., and the illustration of BRAMWELL, B., are at p. 548.

(*m*) (1873), L. R. 6 H. L. 377, at p. 397.

(*n*) At p. 57 of *R. v. Aspinall* (1876), 2 Q. B. D. 48, C. A.

(*o*) *Ibid.*, at p. 65.

(*p*) The only difference was in the form of proceeding: in the one case the misrepresentation being charged as a civil wrong, in the other as a criminal offence.

(*q*) *Scott v. Brown, Doering & Co.*, [1892] 2 Q. B. 724, C. A., at p. 734.

CHAPTER IX.

WHEN MISREPRESENTATION IS ACTIONABLE.

188. HAVING discussed in order all the several matters which are, or may be, relevant in any proceedings founded on misrepresentation, we are now in a position to state generally when, and under what conditions, fraudulent and innocent misrepresentations respectively become amenable to civil remedy and relief, and what is the nature of such remedy and relief in the two classes of case.

SECT. 1. TO WHAT PROCEEDINGS FRAUDULENT MISREPRESENTATION IS AMENABLE.

189. A fraudulent misrepresentation (*a*) whereby the representor has induced the representee to alter his position in some other manner than by entering into a contract or transaction with the representor, is the subject of an action for damages, either at common law or in equity; and the representee, on proof of the several matters mentioned in Chapter X, is entitled to the kinds of remedy therein specified, but to no other relief. Where, however, such alteration of position on the faith of the fraudulent misrepresentation has assumed the form of a contract with the representor, the representee is entitled either to adhere to the contract, and maintain an action for damages as above, or to repudiate it, and, if the repudiation is resisted, sue for the avoidance or annulment thereof, or set up the misrepresentation as an affirmative defence to any action to enforce the contract, subject to the conditions set forth in Chapters XI and XII respectively (*b*), but, in such case, the two rights are strictly alternative to one another; the representee cannot, unless avowedly and expressly as alternatives, pursue both remedies, either simultaneously (*c*)

(*a*) See Ch. V, Sect. 1, *ante*.

(*b*) This is Article 24 of the Code.

(*c*) In *Lemprière v. Lange* (1879), 12 C. D. 675, JESSEL, M.R., after granting the plaintiff part of the relief prayed by him (*viz.* a declaration that the lease in question was void, having been procured by misrepresentation, and an injunction), refused to grant the residue (*viz.* mesne profits and damages), pointing out (at p. 679) the utter inconsistency between the two claims. The "making good" theory—as to which see Sect. 3, Sub-s. (1), *post*—similarly offends against this rule, based as it is on a hazy idea that an amalgam of elements selected from each of the two inconsistent and alternative remedies referred to in the text may, somehow, be the subject of simultaneous equitable relief. There is no objection, however, to claiming *alternatively*

or in succession (*d*), or as it was pithily put by CROMPTON, J., "if you are fraudulently induced to buy a cake, you may return it and get back the price; but you cannot both eat your cake and return your cake" (*e*), which, in more formal language, means that a representor, under such circumstances, cannot both approbate and reprobate. But, though he has no more than a right to choose, on the other hand, he has no less; and if, therefore, he elects to sue for rescission, not having lost his right to do so (*f*), it is no valid objection to his suit, that he might have sued for damages, or, conversely, if he elects to sue for damages, not having lost his right to do so (*g*), it is no answer to his action that he might or ought to have first avoided the contract, or taken proceedings to avoid it, or that the course which he has preferred to take may result in more serious consequences to the representor than if he had sued for rescission (*h*).

SECT. 2. TO WHAT PROCEEDINGS INNOCENT MISREPRESENTATION IS AMENABLE.

190. In the case of an innocent misrepresentation (*i*), if, but not unless the representee's alteration of position consisted in his entering into a contract or transaction with the representor, the representee is entitled to the remedies and relief, by way of active proceedings or affirmative defence, for the purpose of avoiding such contract or transaction, or having it treated as a nullity, which form the subject of Chapters XI and XII respectively, and subject to the conditions therein set forth, but not to damages, or any other relief (*k*).

these inconsistent remedies in one and the same action: see *Greenwood v. Leather Shod Wheel Co.*, [1900] 1 Ch. 421, C. A.

(*d*) In *Ship v. Crosskill* (1870), L. R. 10 Eq. 73, the plaintiff had already had his name removed from the register of shareholders, and so had obtained a statutory annulment of his contract with the company, and, but for the fact that the actual misrepresentors were agents of the company, and therefore for purposes of fraudulent misrepresentation severally as well as jointly liable, and the further fact that the company was insolvent, and therefore the plaintiff could not get restitution in full from them of the money paid to them, such avoidance would have been a bar to the action. But, as this case shows, a subsequent claim will lie against the actual misrepresentor for anything the representee has failed to get under his order for rescission against the other contracting party, being the principal of such actual representor.

(*e*) *Clarke v. Dickson*, No. 1 (1858), E. B. & E. 148, at p. 152.

(*f*) As he may, by affirmation, express or implied, or inability to make complete specific restitution, &c.—see Ch. XI, Sect. 4, Sub-ss. (4), (5), (6), *post*. In that case, his title to relief, if any, is limited to damages against the representor.

(*g*) This he might have done by accepting a voluntary cancellation of the contract, if accompanied by complete restoration of everything he had paid thereunder, but not otherwise: see Ch. X, Sect. 2, Sub-s. (3), *post*, and *Ship v. Crosskill*, *sup*.

(*h*) In *Arnison v. Smith* (1888), 41 C. D. 348, C. A., the plaintiff's counsel contended (see p. 367) that "the cases show that an action to rescind, and an action for deceit, are perfectly independent, and there is not a trace of authority in support of the position that you must resort to the former before resorting to the latter." This contention the C. A. accepted (see COTTON, L.J., at p. 371).

(*i*) See Ch. V, Sect. 2, *ante*.

(*k*) This is Article 25 of the Code.

SECT. 3. MISREPRESENTATION NOT AMENABLE TO NON-STATUTORY
PROCEEDINGS EXCEPT AS ABOVE.

191. Except in accordance with the conditions above stated in general terms, and as elaborated in Chapters X, XI, and XII, misrepresentation, as defined in this work (*l*), is not the subject of any non-statutory action (*m*), or civil proceedings whatsoever (*n*). The net result, in a tabular form, is as follows :—

	Where representee's alteration of position consists in a contract with the representor.	Where representee's alteration of position assumes some other form.
<i>In case of a fraudulent misrepresentation.</i>	Either Rescission or Damages.	Damages only.
<i>In case of an innocent misrepresentation.</i>	Rescission only.	No remedy.

In the above table the term “rescission” is used to indicate all the several forms of proceeding, the object of which is to obtain a judicial avoidance of a contract, or a judicial dealing with it as void, being the several remedies referred to in Chapters XI and XII, whilst “damages” is similarly intended as a shorthand expression to include all actions and counter-claims for damages, whether at common law or in equity.

192. It has been from time to time suggested that there are other remedies than the above known to be law, and also that innocent misrepresentation inducing the representee to alter his position otherwise than by entering into a contract with the representor is not always without remedy, and, in support of the views so propounded, though spasmodically and sporadically, attention has been called to the doctrines of “making good,” and of misrepresentation of authority, respectively. It is proposed to show that the former doctrine is exploded, and that the latter does not involve any exception to the rule that innocent misrepresentation, under the conditions above stated, is not actionable.

(*l*) See Chapters II, III, IV, *ante*.

(*m*) Which of course includes counter-claim.

(*n*) See Article 26 of the Code. As to statutory forms of action and defences (with which the first twelve Chapters of this work are not concerned), see Ch. XIII. It will be remembered that “misrepresentation” means only what it is defined as meaning in Ch. IV, for of course there may be misrepresentations in other senses which, though innocent of fraud, are actionable, for instance, a misrepresentation made not with the object of inducing anybody to alter his position, or in breach of a duty not to mislead, but in breach of a party's duty to his employer or principal, arising out of contract, to use due care and accuracy in giving information relative to the affairs on which he is so employed. See *Thom v. Bigland* (1853), 8 Exch. 725, where the plaintiff, in a case of this character, by unnecessarily alleging fraud, lost his verdict, though otherwise he would have succeeded; *Cassaboglou v. Gibb* (1883), 11 Q. B. D. 797, C. A., and *Chr. Salvesen & Co. v. Reden Aktiebolaget Nordstjernen*, [1905] A. C. 302, II. L.

Sub-sect. (1). "Making Good."

193. For long periods in the history of our jurisprudence an erroneous belief prevailed, and persisted with singular pertinacity, that, under cover of the nebulous and mystical expression "making good," there lurked a special form of equitable relief in cases of misrepresentation, which was neither damages, nor rescission, but a compound of some of the ingredients of each, with a flavour of rectification and specific performance thrown in. The suggested remedy was of the following character : a misrepresentation having been made, whether fraudulently or innocently, by which the representee has been induced to enter into a contract or transaction with the representor, and which thereupon would have given the representee the right either to avoid the contract or transaction, or to affirm it and recover damages, it was thought that equity could, without wholly avoiding the contract, or wholly enforcing it, compel the representor to execute, not the contract which he had entered into, but a new contract containing the terms of the actual contract plus an implied term, or covenant in law, that the representation made by him was true. Nothing more deliriously illogical or perverse has ever emanated from the cloisters of equity. "You cannot eat your cake and have your cake," says proverbial philosophy ; "you cannot eat your cake, and return your cake," says the law in the homely phrase of CROMPTON, J., already cited (o) ; but it has been insisted that in virtue of this supposed doctrine of equity you can have part of your cake, return part, and get a new part in exchange, and then eat and enjoy the compound of old and new. To apply the doctrine to the simplest class of case : a modiste falsely represents to her customer that a dress in her shop window is a Paris model, or an exact copy of the latest creation adorning the person of some leader of fashion, and thereby induces the customer to buy it. Thereupon, according to ordinary principles, the customer, on discovering the truth, can either reject the dress, and recover the money she has paid for it (which is rescission), or she can keep the dress, and recover damages, or she can set up the misrepresentation as an answer to an action for the price, with or without a counter-claim for rescission or for damages. But, according to the theory in question, equity would in one and the same proceeding (1) avoid the contract to deliver the particular dress which was the subject of sale ; (2) order specific performance of a contract which was never in fact made, but which would be regarded as having been rectified into a contract to deliver a dress which was the Paris model, or the exact copy it was represented to be, and by this means (3) award the representee a sort of *redhibitio*, or compensation *in specie*, for the injury she has sustained. It is manifest that in this amazing combination of equitable delicacies, as in the Scotchman's haggis, there is "fine confused feeding" to be had. But is the doctrine really supported by authority ? "These things are, indeed, said ; but are they said

(o) See § 189, *ante*, and note (e) thereto.

truly ? ” It is submitted that the answer to these questions is a clear negative.

194. The error, like nearly all the errors which from time to time have crept into the fabric of English law, is due to the vicious practice of taking up a phrase from the popular vocabulary, a phrase which even by the man in the street is loosely applied to a number of different ideas, and then using it as a term of art, with a still more lax and indiscriminating appropriation of it to a number of new technical, as well as to the old untechnical, concepts. English jurisprudence affects to be indifferent to, or even suspicious of, the science of exact terminology, as it has always been of systematic classification and definition. And yet no body of law has, whilst vaunting its superiority to mere words, been more absolutely their slave (*p*). And so it has been with the unfortunate term “making good,” which, like its Latin equivalent *præstare*, has several meanings, and, like it, has never been used consistently or uniformly in any one of them. Thus it may, and does in some of the authorities, mean no more than compensation in the form of damages; in another type of case it means no more than rescission (which, in restoring the parties to their former position, constitutes a “making good” or a *refectio*) together with all such specific restitution as forms part of the relief granted thereon; in a third, it is used to indicate merely estoppel by representation, which is a rule of evidence in virtue of which a man is not allowed to contradict, or in that sense “make bad,” that which he has once asserted, or, in other words, is compelled to adhere to, and, in that sense, “make good” or “keep good” that which, with the result and object of inducing another to alter his position, he has put forward as “good”; and, lastly, in a great number of the so-called “making good” cases, the expression means no more than the performance of a promise, and in deciding that the one party was, or was not, liable to “make good” something to the other party, the courts have meant no more than that there had, or had not, been (as the case might be) a promise or contract to that effect. A careful examination of the facts, and the reasoning, without paying too much attention to the loose phraseology of, the cases which are put forward in support of the theory that “making good” is a special and unique equitable remedy, will show that they all fall within one or other of the above four classes, and that none of them affords the faintest pretence for saying that the supposed anomalous form of relief under discussion has ever formed part of the law of England.

195. In the first two types of case, which may be considered together (because damages and rescission together constitute the sum and substance of the ordinary relief to which any representee is entitled in a case of misrepresentation), it is obvious that the term “making good” has no special

(*p*) Illustrations of this fatal tendency abound in the law of defamation, and are referred to, and discussed in the author's *Code of the Law of Actionable Defamation*, App. XXI, Sect. 2. See also, generally, on this question of terminology, App. A. Sect. 5, Sub-s. (2), *post*.

significance, and points to no other than the recognized remedies. Thus, in the case where Lord ELDON, L.C., pronounced his celebrated dictum that "it is a very old head of equity that, if a representation is made to another person, going to deal in a matter of interest upon the faith of that representation, the person shall make that representation good, *if he knows it to be false*" (q), it is evident from the last words of the passage cited, and from his previous description of the action before him as "in truth a suit in a court of equity for damages," analogous to a common law action of deceit, such as *Pusley v. Freeman* which he cites (r), that by "making good" Lord Eldon means damages, and nothing else. So, when Lord COTTENHAM, L.C., spoke of the right of a representee "to be put in the same position as if the facts represented were true," he showed, by what he said immediately afterwards ("the misrepresentation raises an equity to restore the parties deceived as nearly as possible to the situation in which, but for the misrepresentation, they would have stood") that he was thinking of nothing but the normal relief by rescission and specific restitution (s). Again, in a case in which the plaintiff claimed to be recouped the money which he had been induced to lend to a third person by the defendant's misrepresentation, what the plaintiff sued for and recovered was damages, pure and simple, viz. the money he had so lent, and the free use by Lord CAMPBELL, L.C., of the term "making good" could not alter the intrinsic nature of the cause of action (t). And in numerous other cases the term is used by pleaders in bills (u), and by counsel in argument (x), in such a way, and in such a relation to the facts alleged, as to show that nothing was meant

(q) *Evans v. Bicknell* (1801), 6 Ves. 174, at pp. 182, 183. Cp. similar observations of Lord ELDON, L.C., at p. 111 of *Ex parte Carr* (1814), 3 Ves. & Beames, 108; 13 R. R. 158.

(r) *Evans v. Bicknell*, *sup.*, at p. 180. Cp. *Mercurether v. Shaw* (1816), 2 Cox, Eq. Cas. 124, where a man, having made an honest misrepresentation as to his sister's fortune, in answer to an inquiry by the lady's intended husband, was sought to be made liable on the "making good" theory, but it was said (pp. 134, 135) that there was "no case either in law or equity where a man making an *honest* representation, *when called upon to give an account of the circumstances of another*, has been made liable in this respect to answer what he has so represented." This language clearly indicates that by "answering," and "making good," nothing but compensation in damages was intended, together with a reference to the ordinary rule that no such relief can be given in the absence of fraud.

(s) *Blair v. Bromley* (1847), 2 Ph. 354, at pp. 360, 361.

(t) *Slim v. Crocher* (1860), 1 De G. F. & J. 518, at pp. 524-526. It so happens that the decision in this case was overruled by *Low v. Bourvic*, [1891] 3 Ch. 82, C. A., but on grounds which render this reversal immaterial for the purposes of the point discussed in the text.

(u) In *Walsham v. Stainton* (1863), 1 De G. J. & S. 678, the bill claimed rescission, and as consequential thereon, an account and similar relief, under the name of "making good."

(x) See *Skidmore v. Bradford* (1869), L. R. 8 Eq. 134, where counsel for the representee applied the term to the indemnity claimed on his behalf against liability under a contract which he was induced to enter into by misrepresentation. It may be doubted, indeed, whether this was strictly a case of misrepresentation at all, since there was a complete cause of action on the proved fact that the deceased had requested the plaintiff to sign the instrument in question, and so incur liability thereunder, which would have raised an implied contract to indemnify him against such liability, without resorting to the theory that the deceased had falsely stated his intention in that behalf; on this view, the case is a very forcible illustration of the lax application of the expression.

beyond the accounts or indemnity or other relief incidental or ancillary to a decree for rescission.

196. The third of the four classes above referred to consists of those numerous cases in which equity lawyers speak of the liability of a representor to "make good" his representation, thereby apparently intending to suggest that he is liable to some special form of relief, when, on examination of the context, and the facts of the case, it is manifest that nothing is really meant beyond this, that the representor is estopped by a previous representation from asserting that such representation was untrue, or that he did not mean what he appeared, and the representee understood him, to say,—the effect of which estoppel may be to expose him to the particular and independent cause of action in which he is estopped, and to which he otherwise might have a defence, but not to create a cause of action, and still less a special form of remedy. It was in this sense that the expression was used successively by Lord MANSFIELD, C.J., who was one of the first, if not the first, common law judge to use it at all (*y*), by Lord THURLOW, L.C. (*z*), Lord CAMPBELL, L.C. (*a*), and PAGE-WOOD, V.-C. (*b*). It is true that, when the sacrosanct term is applied to such cases by equity lawyers, the estoppel is usually dignified by the name of equitable estoppel,—another misleading phrase, since it would seem to imply that there are two species of estoppel, legal and equitable, distinguishable from one another in certain characteristics which they do not share, whereas it is clear from Lord SELBORNE'S definition of equitable estoppel (*c*), as compared with the common law definitions, that there is no discernible *differentia* of any sort which marks off the one from the other in point of principle or substance, and that the rule of evidence in question (which is what estoppel is, and nothing else) is, and always was, one and the same, in whatever court it is invoked. It would seem, however, that, having once invented the

(*y*) *Montefiori v. Montefiori* (1762), 1 W. Bl. 362 ("the law is that where, upon proposals of marriage, third persons represent anything material in a light different from the truth . . . they shall be bound to make good in the manner in which they represented it. It shall be, as represented to be"; which language was used in relation to a case where one of the parties was relying, by way of affirmative defence, on his own fraud, and where therefore the rule, *nemo allegans suam turpitudinem est audiendus*, was rigorously applied).

(*z*) *Neville v. Wilkinson* (1782), 1 Brown C. C. 543, at p. 545, where he refers to the case last cited, and says: "if any one, upon a treaty for any contract, will make a false representation, by means of which he puts the person bargaining under a mistake upon the terms of the bargain, it is a fraud; it misleads the parties contracting upon the subject of the contract." The suit was to restrain the defendant from recovering a demand from one of the plaintiffs, he having represented to their agent that no such demand existed, and the injunction was granted, clearly on the ground of estoppel, though the actual word was not used.

(*a*) *Piggott v. Stratton* (1859), 1 De G. F. & J. 33, at pp. 49, 50, where he cites all the common law estoppel cases in support of the view which he took of the facts of the case before him, and pp. 51, 52, where he distinguishes those facts from the facts in *Jorden v. Money* (1854), 5 H. L. C. 185.

(*b*) *Loffus v. Maw* (1862), 3 Giff. 592, where again the common law cases of estoppel are resorted to and relied upon to support the judgment. Cp. *Yeomans v. Williams* (1865), L. R. 1 Eq. 185 (*per* ROMILLY, M.R., at p. 186).

(*c*) *Citizen's Bank of Louisiana v. First National Bank of New Orleans* (1873), L. R. 6 H. L. 352, at pp. 360, 361, where also, in support of the definition, the common law estoppel cases are cited.

term "making good," and clothed it with special attributes, and set it on a pedestal, equity judges, scandalized by the profane suggestion that it was nothing more than a common law rule of evidence, made desperate endeavours to preserve its exclusiveness and give no further occasion to the enemy to blaspheme, by insisting that, if their "making good" was only a kind of estoppel, it was still a very special and particular kind, for which a title of its own must be created; and so to the misleading name "making good" was added the equally misleading "equitable estoppel." No more ridiculous illustration of defining *in circulo*, or of the blind leading the blind, could be imagined; for to the objection that the authorities of the class in question disclose "making good" to be no other than estoppel under an alias, the answer is,—“yes, but a peculiar species of estoppel, that known as equitable”; and then, to the question,—“what are the marks of equitable estoppel which distinguish it from legal estoppel?”—the only possible answer, in the last resort, must be that equity uses different terminology; and to the further inquiry,—“what is this special terminology?”—none can be suggested but the use of the term “making good.” And so the circular definition commences another revolution (*d*).

197. “Thus bad begins, and worse remains behind,” in tracing the history of this terminological abortion. For so enamoured of the unhappy monster were the equitable Frankensteins who created it that they must needs use the term to indicate no more than the performance of a contract. And it is this application, illustrated by the last of the four classes of case abovementioned, which has wrought the greatest confusion and havoc of any. The cases in question, as will readily be seen by any one who carefully examines the *facts* of each, with a view of ascertaining *what the cause of action was*, and wholly disregards the phraseology adopted in describing such cause of action, are, without a single exception, cases in which an actionable contract or promise was alleged on the one side, and denied on the other. In all the instances in which the contract or promise was made out, and shown to be enforceable, the party relying upon it succeeded, and on that ground alone (*e*); in all those in which a contract or promise was not made out, or, if made out, was not enforceable, the party setting it up failed, and, again, on that ground alone (*f*). The lavish

(*d*) See, on this point, Lord Halsbury's *Laws of England*, title “Estoppel,” vol. xiii, pp. 376, 377, and note (*p*) at the latter page.

(*e*) As in *Hammerley v. De Biel* (1845), 12 Cl. & Fin. 45, which is abstracted in § 27, *ante*, in Ch. II, Sect. 2, Sub-s. (2); *Moorhouse v. Colvin* (1851), 15 Beav. 341 (*quoad* the testator's definite promise to give his daughter a marriage portion of £2000; *quoad ultra*, held no enforceable promise, and therefore no relief given—see the next note); *Prole v. Soady* (1859), 2 Giff. 1 (a clear contract to settle); *Coverdale v. Eastwood* (1872), L. R. 15 Eq. 121 (express contracts with an intended husband, and his mother); *Moore v. Knight*, [1891] 1 Ch. 547, C. A. (a simple case of handing money to a solicitor to invest in mortgage); and *Synge v. Synge*, [1894] 1 Q. B. 466, C. A. (again a case in which the party succeeded wholly on the ground that an express contract had been proved).

(*f*) *McCreuther v. Shaw* (1816), 2 Cox Eq. Cas. 124, cited in note (*r*) to § 195, *ante*, where, at p. 134, it was pointed out that “it was no part of the treaty that the fortune

use of the expression "making good" in these cases in no way established that any of them involved the application, or the existence, of any peculiar principle of equity, or any special equitable remedy, in relation to misrepresentation. Indeed, they were not strictly cases of representation at all. There was no representee, and no representor, in the proper legal sense of the words, but only an alleged promisee, and an alleged promisor. No one of them countenances the heresy, which has so persistently flourished until recent times, that a cause of action can be extracted out of something which is neither an enforceable promise nor an actionable misrepresentation; on the contrary, at a comparatively early stage, the House of Lords distinctly decided in the opposite sense (*g*). But still, owing to the fact that the courts had from time to time encumbered their decisions on the liability of a party to perform a promise with picturesque descriptions of it as a liability to make good a representation, the strange fallacy continued to assert itself periodically (*h*). It may now, it is true, be said that it is extinct (*i*), and that "making good" survives

should be of that amount," that is, the amount which the defendant, in answer to an inquiry, had honestly, but erroneously, represented; *Moorhouse v. Colvin* (1851), 15 Beav. 341, cited in the last note, where ROMILLY, M.R., at p. 349, distinguishes this portion of the testator's letter in which he wrote, with reference to his daughter, "on my death she will be noticed in my will, but to what further amount I cannot say," as *not* amounting to an enforceable promise, from another portion of it, in which the defendant promised that he would give her a marriage portion of £2000, which *was* an actionable promise; *Maunsell v. Hedges*, or *Maunsell v. White* (1854), 4 H. L. C. 1039, *per* Lord CRANWORTH, L.C., and Lord ST. LEONARDS, where an expression of confidence on the defendant's part that he would never alter his will, was held to be either a promise, or nothing: in that case, nothing; *Jorden v. Money* (1854), 5 H. L. C. 185, abstracted in Ch. II, Sect. 2, Sub-s. (2), § 27, *ante*; *Dashwood v. Jermyn* (1879), 12 C. D. 776, at pp. 781, 786; *Maddison v. Alderson* (1883), 8 App. Cas. 467, H. L., abstracted in § 27, *ante*; and *Re Fickus, Farina v. Fickus*, [1900] 1 Ch. 331.

(*g*) *Jorden v. Money, sup.*

(*h*) For instance, STUART, V.-C., in *Prole v. Soady*, BACON, V.-C., at p. 132 of *Coverdale v. Eastwood*, STIRLING, L.J., at pp. 553-555 of *Moore v. Knight*, and KAY, L.J. (delivering the judgment of the C. A.), at pp. 469, 470 of *Synge v. Synge*—all which cases are cited in note (*e*) *sup.*—went out of their way to support their several judgments, wherein it was held that a contract had been established, not merely by references to *Hammersley v. De Biel, sup.*, which were quite legitimate, since there was a clear contract in that case, and the decision proceeded on that ground—see § 27, *ante*—but by a misreading of the chain of reasoning which led the House of Lords to that conclusion, and by an obstinate adherence to the old fallacy that that class of case was somehow of an exceptional nature, and *sui generis*, and that the House intended to lay down special principles as to "making good," without which the result could, or might, not have been arrived at.

(*i*) Thus, at p. 334 of *Re Fickus, Farina v. Fickus, sup.*, it was boldly stated in argument that "the doctrine of making good a representation is exploded," and, though he did not say so in so many words, COZENS-HARDY, J., evidently agreed, judging from the proposition laid down by him at pp. 334, 335, which is utterly inconsistent with the notion that any such doctrine is now, if it ever was, law: "a mere representation that the writer intends to do something in the future is not, though the person to whom it is made relies upon it, sufficient to entitle such person to obtain specific performance or damages. *There must be a contract to entitle the party to obtain any relief.*" The language of Lord CRANWORTH, L.C., at p. 565 of *Bold v. Hutchinson* (1855), 5 De G. M. & G. 558 ("if it"—the representation—"is made with a view of inducing a person to act, and such person has acted on the faith of the representation, then the persons making the representation would in equity be bound to fulfil it") may at first sight seem to favour the "making good" theory; but that it was not so intended, and that nothing was meant beyond the proposition that, if the representation amounts to a contract, it must be fulfilled, is clear from what immediately follows:

only as a *magni nominis umbra*; but it should never be forgotten by those who depreciate the value of exact nomenclature that under this dense and unwholesome *umbra* the groundwork and basis of all sound theory on the subject has been for a long time darkened and infected.

198. Without using the term "making good," or purporting to rely upon the supposed equitable doctrine *eo nomine*, attempts are sometimes made to establish a novel cause of action in respect of some misrepresentation which is not actionable under any of the received and recognized principles. Thus, where an agent made a misrepresentation to his principal as to the existence of a contract between that principal and a third person, the principal sued, not for the expense and loss to which he had been put by acting on the faith of the misrepresentation, which he would clearly have been entitled to, as damages, but for loss of the profits which he would have made if the contract had been entered into with the third person. In other words, he was calling upon the agent to make good his representation, and then claiming to be reimbursed the loss occasioned by a breach of the contract taken to have been entered into in virtue of such "making good." This (as it was put by the C. A.) would be to make the agent a contractor, and the principal a contractee, and was held to be a wholly impossible contention (*k*). But, if there were the slightest foundation for the "making good" theory, the contention would have been quite plausible; and the case is, therefore, useful as a *reductio ad absurdum* of that theory.

Sub-sect. (2). Misrepresentation of Authority.

199. A misrepresentation of authority, whether express or implied from the conduct of the representor in assuming to contract or act as if he had such authority, is actionable, when fraudulent, under the same conditions as any other fraudulent misrepresentation (*l*). But is it now undoubted law that damages can be recovered for an innocent, as well as for a fraudulent, misrepresentation of authority (*m*), and the opinion, formerly entertained, to the contrary (which, it must be confessed, seems *prima facie* the sounder and more logical of the two) has been discarded (*n*).

"if, however," he proceeds, "a person merely says, 'I will leave my daughter £10,000, it will not amount to a misrepresentation, if he should not leave her that sum, though it might amount to a contract to do so.'" So also, where BACON, V.-C., at p. 666 of *Re Royal Victoria Palace Theatre Syndicate, Moore and De La Torre's Case* (1874), L. R. 18 Eq. 661, observes that if A. is induced by misrepresentation to become a partner in a firm of A., B., and C., he can either rescind the partnership contract, or remain a partner, in which case "the representation must be taken to be true, and you"—that is, B. and C.—"must fulfil your part of it," he probably meant (though his meaning was not happily expressed) that, unless B. & C. act up to their representation (in which case either it would not be a misrepresentation, or, if it were, A. would suffer no damage, and, in either case, would have no cause of action) A. has a right to rescission.

(*k*) *Cassaboglou v. Gibb* (1883), 11 Q. B. D. 797, C. A.

(*l*) *Polhill v. Walter* (1832), 3 B. & Ad. 114; *Smout v. Ilbery* (1842), 10 M. & W. 1 (*per Cur.* at p. 9); *Randell v. Trimmer* (1856), 18 C. B. 786 (*per JERVIS, C.J.*, at pp. 793, 794); and *Starkey v. Bank of England*, [1903] A. C. 114, H. L.

(*m*) See the authorities cited in note (*r*), *infra*.

(*n*) In *Smout v. Ilbery*, *sup.*, it was distinctly held that the misrepresentation of authority must constitute a wrong, in order to entitle the representee to relief (*pp.*

At first sight, therefore, this would seem to be an anomaly, and an exception to the rule above enunciated that innocent misrepresentation is not the subject of an action of deceit; and for a time, and, indeed, until a comparatively recent date, it was so considered (*o*). But the House of Lords has definitely decided that, when regard is had to the theory of representations of authority now firmly established, the right to recover damages for misrepresentation of such authority, though not fraudulent, involves no such exception (*p*).

200. The theory referred to is this. There never was, and never can be, any question but that a representation as to the existence or extent of authority conferred upon any representor to enter into a proposed contract or binding transaction with the representee, may be a most material one, may actually induce the representee to contract on the faith of it, and may result in loss or injury to him. So far, there is no reason why the ordinary principle of the law of misrepresentation should not apply to any such case; but, inasmuch as the application of these principles would of necessity deny to any one who has trusted to an innocent representor's unwarranted assumption of authority all remedy whatever either against the alleged principal or the representor (*q*), the law has been astute to devise a doctrine in virtue of which, without infringing on the rules relating to misrepresentation, relief in such cases may be given. By viewing the assumption of authority as an implied warranty, undertaking, promise, or contract, as well as an implied representation that the party has the authority which he professes to have, the courts have made it possible to treat the non-existence of the authority assumed as a breach of warranty or contract, as well as a misrepresentation, and, since in the former case it is wholly immaterial whether the breach was fraudulent or innocent, the desired result has thus been achieved (*r*).

9-11), but this opinion was held erroneous, and overruled in *Collen v. Wright* (1857), 8 E. & B. 647, Exch. Ch., as was pointed out by KEKEWICH, J., at pp. 349, 350 of *Halbot v. Lens*, [1901] 1 Ch. 344, and by the C. A. in *Yonge v. Toynbee*, [1910] 1 K. B. 215, C. A. (*per* BUCKLEY, L.J., at p. 226).

(*o*) LINDLEY, L.J., at p. 61 of *Firbank's Executors v. Humphreys* (1886), 18 Q. B. D. 54, C. A., so describes it, *per incuriam*, and an argument in support of this view was one of the two alternative contentions presented to the House of Lords, though unsuccessfully, in the case cited in the next note.

(*p*) *Starkey v. Bank of England*, [1903] A. C. 114, H. L., *per* Lord HALSBURY, L.C., at pp. 117, 118, and Lord DAVEY at pp. 118, 119.

(*q*) Not against the alleged principal in contract, because *ex hypothesi*, no contract was in fact or law made with him; nor against the representor for misrepresentation, either by way of rescission (for the contract did not purport to be made with him, and so there is no contract to rescind), or for damages (for the representor was innocent).

(*r*) *Collen v. Wright*, *sup.*; *Dickson v. Reuter's Telegram Co.* (1877), 3 C. P. D. 1, C. A., *per* BRAMWELL, L.J., at p. 5, BRETT, L.J., at p. 8, and COTTON, L.J., at p. 8; *Firbank's Executors v. Humphreys*, *sup.*, *per* Lord ESHER, M.R., at p. 60, and LINDLEY, L.J., at p. 61; *Halbot v. Lens*, *sup.*; *Starkey v. Bank of England*, *sup.*, *per* Lord HALSBURY, L.C., at pp. 116, 117; *Yonge v. Toynbee*, *sup.*, *per* BUCKLEY, L.J., at pp. 226, 227, and SWINFEN-EADY, J., at pp. 231-233; and *Simmons v. Liberal Opinion, Ltd.*, *Re Dunn*, [1911] 1 K. B. 966, C. A. See, generally, on this topic, Lord Halsbury's *Laws of England*, title, "Agency," vol. i, pp. 221-223.

CHAPTER X.

THE ACTION FOR DAMAGES FOR FRAUDULENT MISREPRESENTATION.

201. ON proof of the several matters specified below, an action, or counter-claim (*a*), is maintainable at the suit of the representee to recover damages in respect of misrepresentation. Such action is founded in tort, and the same principles of law and rules of evidence are applicable, in whatever Division of the High Court the proceedings be instituted (*b*).

SECT. 1. INGREDIENTS OF THE CAUSE OF ACTION.

202. In any action for damages, the burden is on the representee of alleging, with all necessary particulars (*c*), and, having so alleged, of establishing, each of the following matters (*d*), except so far as any of them may be expressly or impliedly admitted before or at the trial (*e*) :—

(*a*) See *Redgrave v. Hurd* (1881), 20 C. D. 1, C. A., and some of the cases cited in Ch. XII, Sect. 1, *post*, in which counter-claims for damages were set up by the defendant. In speaking of actions, plaintiffs, and defendants, in the course of this Chapter, it will be understood that these expressions are intended to include counter-claims, defendants counter-claiming, and plaintiffs resisting such counter-claims, respectively.

(*b*) The action at common law was originally known, and is still often described, as an “action on the case for deceit,” or (more shortly) an “action of deceit,” or “for deceit.” A bill for the same purpose in equity used formerly to be called an equitable claim for damages; but it has always been recognized that, whatever the tribunal, or the name, the principles of substantive law applicable to the two forms of proceeding, and the nature of the remedy and relief obtainable, are precisely the same: *Peek v. Gurney* (1873), L. R. 6 H. L. 377 (*per* Lord CHELMSFORD at p. 384, and Lord CAIRNS at p. 390); *Arkuwright v. Newbold* (1881), 17 C. D. 301, C. A. (*per* COTTON, L.J., at p. 320); *Smith v. Chadwick* (1884), 9 App. Cas. 187, H. L. (*per* Lord BLACKBURN at p. 193); *Schroeder v. Mendel* (1887), 37 L. T. 452, C. A. (*per* COTTON, L.J., at p. 454); and *Derry v. Peek* (1889), 14 App. Cas. 337, H. L. (*per* Lord HERSCHELL at p. 360).

(*c*) See Ch. XV, Sect. 2, Sub-s. (1), *post*, as to particulars of fraud.

(*d*) This is Article 28 of the Code. As to the special *alleganda et probanda* in statutory proceedings for misrepresentations, see Ch. XIII, *post*.

(*e*) In most of the reported cases only a few of these questions have been put in issue: there is no case in which all of them have. Hence it is almost impossible to find a judgment, or passage from a judgment, which comprises all the elements stated in the text, for judges do not pretend to deliver exhaustive lectures on the whole branch of law which affects the particular case before them, but only to enunciate propositions sufficiently comprehensive to include the matters which the parties have brought into debate. The nearest approach to a full judicial exposition of the constituent elements of a cause of action for damages for misrepresentation, is to be found in *Shrewsbury v. Blount* (1841), 2 M. & G. 475 (*per* ERSKINE, J., at p. 498), *Denton v. G. N. Ry. Co.* (1856), 5 E. & B. 860 (*per* Lord CAMPBELL, C.J., at pp. 866, 867, and

- (i) That the alleged representation consisted of something said, written, or done, which amounts in law to a representation :
- (ii) That the defendant was the representor :
- (iii) That the plaintiff was the representee :
- (iv) Inducement and Materiality :
- (v) Falsity :
- (vi) Alteration of Position :
- (vii) Fraud :
- (viii) Damage.

203. On establishing all the above issues, or such of them as are challenged, the plaintiff is entitled to relief in the form of damages ; if he fails in any one of them, his action fails altogether (*f*). The first six of these *alleganda et probanda* are common to all forms of proceeding in respect of misrepresentation (*g*), and have already been fully discussed (*h*) ; the last two, fraud and damage, are peculiar to actions of the class now under consideration.

204. From the earliest times it has been recognized that the concurrence of fraud and damage is essential to, and a distinguishing mark of, the cause of action in question (*i*). Indeed, the very names of this cause of action, "action of deceit," and "action for damages," connote respectively the two elements. The necessity for proving damage has been dealt with already (*k*). The necessity for establishing fraud would, at first sight, appear to be so obvious as to occasion amazement that it could ever have been the subject of the anxious consideration that it has received, or the many decisions to which it has given rise (*l*) ; but, when once the fact is

WIGHTMAN, J., at pp. 867, 868) ; *Smith v. Chadwick*, *sup.* (per Lord SELBORNE, L.C., at p. 190, and Lord BLACKBURN at pp. 195-197), and *Arnison v. Smith* (1888), 41 C. D. 348, C. A. (per Lord HALSBURY, L.C., at pp. 367, 368).

(*f*) As to failure to prove the above issues, other than fraud, see the references to other Chapters of this work which are given in notes (*h*) and (*k*), *inf.* As to failure to prove fraud, see the cases cited in note (*o*), *inf.*

(*g*) See those referred to in Chapters XI and XII, *post*, as well as that now under discussion.

(*h*) See Ch. II as to what amounts to a representation in law, and Ch. III as to how such a representation must be proved to have been made ; Ch. VIII, Sect. 1, as to who is deemed a representor, and Sub-s. (7) thereof as to burden of proof ; Ch. VIII, Sect. 2, as to who is deemed a representee, and Sub-s. (4) thereof as to burden of proof ; Ch. VI, Sects. 1 and 2, as to documents and materiality, and Sect. 3 thereof as to burden of proof ; Ch. IV as to falsity, and Sect. 1 thereof as to burden of proof ; and Ch. VII, Sect. 1, as to alteration of position, and Sub-s. (3) thereof as to burden of proof.

(*i*) *Baily* (or *Bayly* or *Bailie*) v. *Merrell* (or *Merrel* or *Merrill*) (1615), 3 Bulstr. 94 (per CROKE, J., at p. 95 : "damage without fraud gives no cause of action, but where these two do concur and meet together, then an action lieth") ; *Pasley v. Freeman* (1789), 3 Term. Rep. 51 ("the foundation of this action is fraud and deceit in the defendant, and damage to the plaintiff" : per BULLER, J., at p. 56, who cites the above statement of CROKE, J., but not quite accurately) ; and *Langridge v. Levy* (1838), 4 M. & W. 337, Exch. Ch. (at p. 338).

(*k*) See Ch. VII, Sect. 2, and, as to burden of proofs, Sub-s. (2) thereof, *ante*.

(*l*) This surprise was frequently expressed by BOWEN, L.J., *e.g.* at pp. 499, 500 of *Le Lièvre v. Gould*, [1893] 1 Q. B. 491, C. A. ("a plaintiff cannot succeed in an action of deceit or fraud without proving that the defendant was fraudulent. That any doubt should ever have been cast upon that proposition seems to me strange. . . . There must be fraud in order to found an action of fraud").

appreciated that the term "fraud," as used by judges and jurists, until *Derry v. Peek* (*m*), was in a state of continual flux, at one time meaning one thing, and at other times other things (*n*), the wonder is rather that the authorities have not been more numerous than they have. One clear result, however, emerges from a consideration of the cases, viz. that at all periods in the history of our jurisprudence, a misrepresentation which was not alleged, or was not proved, to be also fraudulent, whatever that term may at the time being have been deemed to include, was held not to be the subject of an action for damages (*o*). In every case where it was so alleged, or was so alleged and proved, as the case might be, the plaintiff succeeded, or, if he failed, he failed on grounds independent of the fraudulent character of the misrepresentation (*p*).

(*m*) (1889), 14 App. Cas. 337, H. L.

(*n*) See App. A, Sects. 2, 3, 4, *post*.

(*o*) In the following cases at common law the declaration or statement of claims was held bad on the ground that fraud was not sufficiently alleged, as well as falsity: *Chandeler v. Lopus* (1603), Cro. Jac. 4, 1 Dyer, 75A, Exch. Ch. (*per* POFHAM, C.J.: "if I have any commodities which are damaged and I, knowing them to be so, sell them for good, and affirm them to be so, an action upon the case lies for the deceit; but although it be damaged, if I, knowing not that, affirm them to be good, still no action lies, without I warrant them to be good." In this case, all that was averred was that the defendant affirmed a certain stone to be a Bezoar stone "*ubi re verâ* it was not," and "all the justices and barons besides" (meaning "except") ANDERSON, J., held that, no *scienter* being alleged, nor any warranty, the declaration disclosed no cause of action); *Hill v. Balls* (1857), 2 H. & N. 299 (*per* POLLOCK, C.B., at p. 302, MARTIN, B., at p. 304, and BRAMWELL, B., at pp. 305, 306); *Behn v. Kemble* (1859), 7 C. B. (N. S.) 260 (*per* ERLE, C.J., at p. 267: "the count does not allege any fraudulent misrepresentation by the defendant, nor any *scienter*"); *Childers v. Wooller* (1859), 2 E. & E. 287, 306, 307; and *Thiodon v. Tindall* (1891), 65 L. T. 343, Div. Ct. In the following common law cases, there being no proof of fraud, in addition to falsity, either the plaintiff was non-suited, or judgment entered for the defendant *in banco*: *Haycraft v. Creasy* (1801), 2 East, 92; *Pickering v. Dowson* (1813), 4 Taunt. 779; *Ames v. Milward* (1818), 8 Taunt. 637 (where an award in favour of the plaintiff was set aside, because the arbitrator had specifically found that the misrepresentation was not fraudulent, though the evidence clearly pointed in the opposite direction); *Horncastle v. Moat* (1824), 1 C. & P. 166; *Freeman v. Baker* (1833), 5 B. & Ad. 797 (at pp. 805, 807); *Shrewsbury v. Blount* (1841), 2 M. & G. 475; *Taylor v. Ashton* (1843), 11 M. & W. 401 (*per* PARKE, B., at p. 413); *Collins v. Evans* (1844), 5 Q. B. 820, Exch. Ch. (at pp. 827-830); *Ormerod v. Huth* (1845), 14 M. & W. 651, 664, Exch. Ch.; *Longmeid v. Holliday* (1851), 6 Exch. 761 (*per* Cur. at p. 766); *Dickson v. Reuter's Telegram Co.* (1877), 3 C. P. D. 1, C. A. (at pp. 6, 7); *Schroeder v. Mendel* (1877), 37 L. T. 452, C. A.; *Jolliffe v. Baker* (1883), 11 Q. B. D. 255, Div. Ct.; *Bellairs v. Tucker* (1884), 13 Q. B. D. 562, Div. Ct. (*per* DENMAN, J., at p. 576, and MANISTY, J., at pp. 580-582); *Burtsal v. Bianchi* (1892), 65 L. T. 678; and *Parsons v. Barclay & Co.* (1910), 103 L. T. 196, C. A. The following are the equity cases, in which fraud not being proved or (in some cases) even alleged, the action failed: *Evans v. Bicknell* (1801), 6 Ves. 174 (*per* Lord ELDON, L.C., at pp. 188, 191, 192); *Rashdall v. Ford* (1866), L. R. 2 Eq. 750, 754; *Ship v. Crosskill* (1870), L. R. 10 Eq. 73; *Redgrave v. Hurd* (1881), 20 C. D. 1, C. A. (where the counter-claim, so far as it claimed damages, was dismissed, because there was no proof of fraud; so far as it claimed rescission, where such proof was unnecessary, it succeeded: *per* JESSEL, M.R., at p. 12); *Derry v. Peek* (1889), 14 App. Cas. 337, H. L. (*per* Lord HERSHELL at p. 374); *Glasier v. Rolls* (1889), 42 C. D. 326, C. A.; *Angus v. Clifford*, [1891] 2 Ch. 449, C. A. (*per* LINDLEY, L.J., at pp. 462-468, BOWEN, L.J., at p. 471, KAY, L.J., at p. 479); *Low v. Bowverie*, [1891] 3 Ch. 82, C. A.; *Coleman v. North* (1898), 47 W. R. 57; *Manners v. Whitehead* (1898), 1 F. 171; and *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392, C. A. (*per* LINDLEY, M.R., at pp. 427-431). As to the consequence of alleging fraud unnecessarily, see Ch. XI, Sect. 1, Sub-s. (2).

(*p*) The cases cited in the last note are of far more importance, as being what Bacon calls "prerogative instances," which test the principle of law for which

SECT. 2. AFFIRMATIVE DEFENCES TO ACTIONS FOR DAMAGES FOR
FRAUDULENT MISREPRESENTATION.

205. A representor, for the purpose of resisting an action or counter-claim for damages for fraudulent misrepresentation, is entitled to set up

they are cited, than the cases now to be mentioned; but it may, nevertheless, be of some use to give a rough classification (according to the subject-matter of the representation) of the more important decisions in which the representee was held entitled to damages on proof of fraud in addition to falsity, or would have been so held, but for defects of other kinds in his evidence. The groups are as follows: (1) *Representations on sale of interests in land*: *Peutress v. Austen* (1816), 6 Taunt. 522; *Brandling v. Plummer* (1854), 2 Drewry 427, 100 R. R. 209; *Richardson v. Sylvester* (1873), L. R. 9 Q. B. 34; and *Cann v. Willson* (1888), 39 C. D. 39, a case which is no longer law, by reason of the unsound decision that the plaintiff was a representee, but not on any ground which affects its correctness in any other respect; see also Ch. XIII, Sect. 2. Sub-s. (1), as to cases of implied misrepresentation on auction sales of land. (2) *Representations on sale of chattels*: *Jones v. Bowden* (1813), 4 Taunt. 847; *Adamson v. Jervis* (1827), 4 Bing. 66; *Langridge v. Levy* (1838), 4 M. & W. 337, Exch. Ch.; *Wright v. Crookes* (1840), 1 Scott (N. R.) 685, Exch. Ch.; *Coleman v. Riches* (1855), 16 C. B. 104; *Udell v. Atherton* (1861), 7 H. & N. 172; *Mullett v. Mason* (1866), L. R. 1 C. P. 559; *Waddell v. Blockey* (1879), 4 Q. B. D. 678, C. A.; *Ludgater v. Love* (1881), 44 L. T. 694, C. A.; *Gill v. McDowell*, [1903] 2 Ir. R. 463; and *Malcolm Brunner & Co. v. Waterhouse & Sons* (1908), 24 T. L. R. 854; and see Ch. XIII, Sect. 2. Sub-s. (2), as to implied misrepresentations on auction sales of chattels. (3) *Representations in prospectuses, and similar documents, issued by companies, as to their undertakings, property, and affairs*: *Clarke v. Dickson*, No. 2 (1859), 6 C. B. (N. S.) 453; *Scott v. Dixon* (1859), 29 L. J. (EXCH.) 62 n.; *Bedford v. Bagshaw* (1859), 4 H. & N. 538; *Peek v. Gurney* (1873), 6 H. L. 377; *Weir v. Bell* (1878), 3 Ex. D. 238, C. A.; *Edgington v. Fitzmaurice* (1885), 29 C. D. 459, C. A.; *Knox v. Hayman* (1892), 67 L. T. 137, C. A.; *Andrews v. Mockford*, [1896] 1 Q. B. 372, C. A.; *Gerson v. Simpson*, [1903] 2 K. B. 197, C. A.; and *J. & P. Coats, Ltd. v. Crossland* (1904), 20 T. L. R. 800. (4) *Representations by firms or individuals as to takings, earnings, profits, etc., of a business or undertaking*: *Dobell v. Stevens* (1825), 3 B. & C. 623; *Pearson v. Wheeler* (1825), Ry. & M. 303; 27 R. R. 751; *Bouring v. Stevens* (1826), 2 C. & P. 337; *Pilmore v. Hood* (1838), 5 Bing. N. C. 97; and *Richardson v. Dunn* (1860), 8 C. B. (N. S.) 655. (5) *Representations as to validity of transactions, authority and power to do certain acts, genuineness of instruments, etc.*: *Barley v. Walford* (1846), 9 Q. B. 197; *Eastwood v. Bain* (1858), 3 H. & N. 378; *West London Commercial Bank v. Kitson* (1884), 13 Q. B. D. 360, C. A.; *British Mutual Banking Co. v. Charnwood Forest Railway Co.* (1887), 18 Q. B. D. 714, C. A.; *Marnham v. Weaver*, [1899] 80 L. T. 412; and *Kettlewell v. Refuge Assurance Co.*, [1908] 1 K. B. 545, C. A.: with which compare the cases cited in note (h) to § 199, as to fraudulent misrepresentation of authority. (6) *Representations as to a third person's credit*: *Pasley v. Freeman* (1789), 3 Term. Rep. 51; *Tapp v. Lee* (1803), 3 B. & P. 367; *Hamar v. Alexander* (1806), 2 B. & P. (N. R.) 241; *Biddle v. Levy* (1815), 1 Stark. 20; *Foster v. Charles*, No. 1 (1830), 6 Bing. 396; *Foster v. Charles*, No. 2 (1830), 7 Bing. 105; *Corbett v. Brown* (1831), 8 Bing. 33; *Barwick v. English Joint Stock Bank* (1867), L. R. 2 Exch. 259; *Ramshire v. Bolton* (1869), L. R. 8 Eq. 294; *Leddell v. McDougal* (1881), 29 W. R. 403, C. A.; and the cases of fraudulent misrepresentation of credit, orally made, which failed only because of the statutory objection, cited in the notes to Sect. 2, Sub-s. (4) of this Chapter, *post*. (7) *Representations as to personality, and identity*: see several of the cases cited in the notes to § 129, *ante*. (8) *Representations as to the safety of a place, a chattel, or an investment*: see, as to the two former species, some of the cases cited in the notes to § 145, *ante*; and, as to safety of investments, *Ingram v. Thorpe* (1848), 7 Hare, 67, and *Smith v. Pockocke* (1854), 2 Drewry 197; 100 R. R. 80. (9) *Miscellaneous representations*: *Denton v. G. N. Ry. Co.* (1856), 5 E. & B. 860 (railway time-table), *Burrows v. Rhodes*; [1899] 1 Q. B. 816, C. A. (misrepresentation that the "Jamieson Raid" had the sanction and approval of Her Majesty); *Pritty v. Child* (1902), 71 L. J. (K. B.) 512, Div. Ct. (water-finder); *Dott v. Brickwell* (1906), 23 T. L. R. 61 (misrepresentation by a money-borrower inducing an unregistered money-lender to make a loan); *S. Pearson & Son, Ltd. v. Dublin Corpn.*, [1907] A. C. 351, H. L. (misrepresentation on plan of existence and position of a certain wall); and *Boyd and Forrest v. Glasgow and S. W. Railway Co.*, [1911] Sc. Ct. of Sess. Cas. 33 (misdescription of nature of soil to be excavated by contractors).

certain affirmative defences, special to this class of tort, in addition to those which may be raised to actions of tort in general, whether at common law or by statute, such as release (*q*), illegality (*r*), estoppel by *res judicata* (*s*), or a statute of limitations (*t*). With this latter class of plea this treatise is not immediately concerned. The former class, however, which contains five species, four of them non-statutory, and one the creation of statute in reference to misrepresentations of a certain description, it is necessary to discuss separately. The burden of establishing any affirmative defence, as the word "affirmative" itself imports, is upon the representee (*x*).

Sub-sect. (1). Representor's Knowledge of the Truth.

206. A representee who knows the truth is not deceived. Proof, therefore, by the representor of such knowledge on the representee's part is a good answer in whatever form of proceeding the representee is setting up the misrepresentation, whether in a form which necessitates the establishment of fraud (*y*) as in the kind of action now under consideration, or by

(*q*) Article 29 of the Code states the several affirmative pleas to actions for damages. Where release is set up, the exact terms and limits of the instrument must be scrutinised: thus, in *Turguand v. Marshall* (1869), 4 Ch. App. 376, where the liquidator had released a shareholder from all claims against him as such shareholder, or as a contributory, this was held to be no release of the liquidator's claims against him as a director for fraud.

(*r*) This plea is of no avail when the very misrepresentation consisted either in a fraudulent misrepresentation of the general law (see Ch. II, Sect. 4, Sub-s. (2), *ante*), or in a statement of facts which, if true, would have rendered the transaction legal: *Burrows v. Rhodes*, [1899] 1 Q. B. 816, Div. Ct. And a money-lender who, being unregistered, could not recover the amount of his loan, the contract being illegal, was nevertheless held entitled to sue for damages for a fraudulent misrepresentation whereby he was induced to advance the money, and a plea of illegality to such an action is bad: *Dott v. Brickwell* (1906), 23 T. L. R. 61.

(*s*) See Lord Halsbury's *Laws of England*, title, "Estoppel," vol. xiii, pp. 325-361. But, if the judgment was itself obtained by fraud, there is no estoppel: *ibid.*, pp. 351, 352. As to setting aside of judgments so obtained, see Ch. XIV, Sect. 1, Sub-s. (1), *post*.

(*t*) See the various treatises on the Statutes of Limitations, and Ch. XI, Sect. 4, Sub-s. (1), *post*. The statutes afford no answer to a case of fraud against a trustee: *Dooby v. Watson* (1888), 39 C. D. 178; and, in any action, whether founded on fraudulent misrepresentation, or on any other cause of action, it is a good reply to a plea of the statute, that the plaintiff did not discover, and had no reasonable means of discovering, the fraudulent character of the representation within six years of action brought: *Gibbs v. Guild* (1882), 9 Q. B. D. 59, C. A.; *Laurance v. Norreys*, [1890] 15 App. Cas. 210, H. L. (where, however, the concealed fraud was not even alleged in a form which the court could take any notice of). Fraudulent misrepresentation cannot be "an act done in pursuance of a public duty," within the meaning of the Public Authorities Protection Act, 1893: *S. Pearson & Son, Ltd. v. Dublin Corpn.*, [1907] A. C. 351, H. L. (*per* Lord LOREBURN, L.C., at p. 354, Lord JAMES at p. 362, and Lord ATKINSON at pp. 367, 368).

(*x*) See, generally, the cases cited in the notes to this Section where, not having discharged this burden, the representee failed in his action.

(*y*) It has been thought convenient to deal in this place, once for all, with the affirmative plea in question, since it is common to all forms of proceeding for misrepresentation, and, when describing hereafter the affirmative pleas to rescission, and the affirmative replies to a defence setting up misrepresentation,—see Ch. XI, Sect. 4, Sub-s. (1), and Ch. XII, Sect. 2, respectively—it will be sufficient merely to refer to this present statement. It is clear from the many cases cited in the notes immediately following that, where a case of actual and full knowledge is made out, the defence is complete: but the paucity of the reported decisions in which the plea has succeeded is some evidence of the extreme difficulty in discharging the very serious burden

way of a claim to avoid a contract (z), or an affirmative plea to an action brought to enforce it (a), when it is immaterial whether the misrepresentation was fraudulent or innocent. In all cases alike the representee cannot be heard to say that he was misled by a statement which was intended to, but did not in fact, mislead him, or to complain even of a deliberate and proved perversion of facts, of the exact truth of which he had complete information and cognisance.

207. It is sufficient, in order to make good the plea to prove either that the facts were within the knowledge of the representee when the statement was made, or that they were subsequently made known to him from other sources of information, or disclosed by the representor himself, before the representation was acted upon (b); for, as has been seen (c), every representation is a continuing one during the interval, if there is an interval, between the making of it and the representee's alteration of position. If the representor's disclosure is made after the latter date, it is entirely ineffectual, unless accompanied by complete restitution or compensation, or at least an offer thereof (d).

imposed on the representee, as stated in the next three paragraphs of the text. There does not seem to be a single example of its success in any action for fraudulent misrepresentation, unless it be *Eaglesfield v. Londonderry (Marquis)* (1878), 26 W. R. 540, H. L. (per Lord HATHERLEY at p. 541, who refers to the plaintiff's full knowledge of the acts and circumstances of the company, as one amongst other reasons why his action ought to fail), and only a very few instances in the other two classes of case, as to which see the next two notes.

(z) Examples of proved knowledge of the truth constituting a bar to an action or analogous proceeding for rescission are: *Atwood v. Small* (1838), 6 Cl. & F. 232 (per Lord COTTENHAM, L.C., at p. 390, and Lord BRUGHAM at pp. 448-450); *Vigers v. Pike* (1842), 8 Cl. & Fin. 562 (per Lord COTTENHAM, L.C., at p. 648); *Lumley v. Dumborough* (1870), 22 L. T. 597; *Begbie v. Phosphate Sewage Co.* (1875), L. R. 10 Q. B. 491 (per Cur., at pp. 498, 499); *Re British Burmah Lead Co., Ex parte Vickers* (1887), 56 L. T. 815; and *Wasteneys v. Wasteneys*, [1900] A. C. 446, P. C. (a very curious case, in which it was proved (see p. 449), that the plaintiff, who professed to have been deceived by his wife's asseverations of chastity into executing a deed of separation, did not in fact believe a word of them, and positively so stated orally, when executing the deed, and afterwards in a letter to the alleged fraudulent misrepresentor: "you and I know it to be false": it is not often that, from the representee's own contemporaneous and subsequent declarations, evidence of such a complete and convincing character is available to establish the plea of knowledge). In *Nelson v. Stocker* (1895), 4 De G. & J. 458, where a misrepresentation of majority was set up as a reply to a defendant's plea of infancy, it was proved that the intended wife knew the truth, though her solicitor to whom the representation was made did not. Held that this constituted a good answer to the plea.

(a) *Dyer v. Hargrave* (1805), 10 Ves. 505, where the representee's complete knowledge of the property he was purchasing, having lived there all his life and having had its situation specially pointed out to him, was held to be an answer both to his affirmative defence to the vendor's action for specific performance, and also to his cross-bill to set aside the contract: per GRANT, M.R., at pp. 508, 509; and *Bawden v. London, Edinburgh and Glasgow Assurance Co.*, [1892] 2 Q. B. 534, C. A., where the defendants set up, as a defence to an action on an accident policy, the fraudulent misrepresentation of the plaintiff that he had no physical infirmity, whereas in fact he was a one-eyed man: but, inasmuch as the company, through their agent, had ocular cognisance of this palpable fact, the defence failed.

(b) See the cases cited in notes (z) and (a), *sup.*, in some of which the knowledge was derived *aliunde*, in others, from the representor; in others, both from him and from outside sources.

(c) Ch. IV, Sect. 3, *ante*.

(d) *Arnison v. Smith* (1888), 41 C. D. 348, C. A. (per Lord HALSBURY, L.C., at pp. 369, 370, COTTON, L.J., at pp. 371, 372, and LINDLEY, L.J., at p. 373).

208. The knowledge must be clearly proved to have been full and complete. Partial and fragmentary information, or mere suspicion, will not do (e).

209. Moreover, actual (*f*) and personal (*g*) knowledge must be proved. Constructive (*h*), or imputed (*i*), notice is entirely out of the question (*k*).

(e) *Martin v. Cooper* (1846), 3 Jo. & Lat. 496 (at pp. 507, 508, *per* Lord St. LEONARDS, then Sir EDWARD SUGDEN, L.C., of Ireland); *Wilson v. Short* (1847), 6 Hare, 366 (*per* WIGRAM, V.-C., at p. 376, who points out that the onus is on the representor to prove clear and distinct notice); *Hughes v. Jones* (1861), 3 De G. F. & J. 307 (notice must be as "clear, precise, and definite" as the misrepresentation, *per* KNIGHT-BRUCE, L.J., at p. 312); *Higgins v. Samels* (1862), 2 J. & H. 460 (where the misrepresentation was that limestone in a certain quarry would produce lime "fit for the London market," and the representor set up, as an answer, that the representee had looked at the stone in the quarry, but WOOD, V.-C., at p. 468, pointed out that this was no proof that knowledge of the incapacity of the stone to produce the lime was brought home to the representee, who was not a lime-burner); and *Redgrave v. Hurd* (1881), 20 C. D. 1, C. A. (*per* JESSEL, M.R., at pp. 15-17).

(f) As distinguished from "constructive."

(g) As distinguished from "imputed."

(h) Constructive notice is the name usually given by equity lawyers to that kind of notice which is deemed to arise in contemplation of law from wilful blindness, or as KNIGHT-BRUCE, L.J., termed it, "diligence in ignorance."

(i) Imputed notice is that notice which the law imputes to a principal through his agent, if he is his agent to know, or to be informed as to, the matters in question; or the notice which the law infers of facts and documents from proved actual notice of a fact or document pointing to their existence.

(k) *Dyer v. Hargrave* (1805), 10 Ves. 505, where, as to two minor misrepresentations, relating to the state of repair of the house, and the cultivation of the marsh land, GRANT, M.R., held that, though these were "objects of sense," yet knowledge of the truth could only be brought home to the purchaser by proof of the actual minute examination which was necessary for that purpose, and, since the vendor had not discharged this burden, he was ordered to make an allowance: as to the third, and most important, misrepresentation, however, viz. that the land was enclosed in a ring fence, whereas in fact it was distributed, no relief whatever was granted to the representee,—see note (a), *sup.*—because this was a matter palpable to the view, and it was shown that the representee had in fact had this view; *Dobell v. Stevens* (1825), 3 B. & C. 623 (plea that plaintiff might have inspected the books of the public house failed); *Pearson v. Wheeler* (1825), Ry. & M. 303, 27 R. R. 751 (same point, and same result); *Bouring v. Stevens* (1826), 2 C. & P. 337 (same point); *Harris v. Kemble* (1831), 5 Bligh. (N. S.) 730 (*per* Lord LYNDBURST, at pp. 749, 750; the mere fact that the representee had access to the books of the theatre went for nothing, in the absence of proof that he had derived full knowledge from them, which he probably could not do without the assistance of accountant); *Reynell v. Sprye*, *Sprye v. Reynell* (1852), 1 De G. M. & G. 660 (mere provision of means of knowledge, or suggestion to take advice, is no answer: *per* KNIGHT-BRUCE, L.J., at p. 687, and Lord CRANWORTH, L.J., at pp. 709, 710); *Price v. Macaulay* (1852), 2 De G. M. & G. 339 (*per* KNIGHT-BRUCE, L.J., at pp. 346, 347: "it is said that subsequently he had such notice as might have led him to ascertain how the facts stood. This, however, is not sufficient in a case of misrepresentation; he must be shown clearly to have had information of the real state of the facts"); *Brandling v. Plummer* (1854), 2 Drew. 427, 100 R. R. 209 (*per* KINDERSLEY, V.-C., at pp. 431, 432: mere fact that the representee was a resident and might have inspected the land which he was deceived into purchasing, is no defence); *Rawlins v. Wickham* (1858), 3 De G. & J. 304 (representee held entitled to rely on the representation, and not bound to look at the books, or investigate: *per* KNIGHT-BRUCE, L.J., at pp. 313, 314); *Central Railway Co. of Venezuela v. Kisch* (1867), L. R. 2 H. L. 99 (a mere reference in a company case to documents, such as the memorandum and articles of association, and reports, etc., which, if inspected, would at once have set the representee on the road to discovery, held to be ineffectual: Lord CHELMSFORD, L.C., at pp. 118, 120, 121, and Lord CRANWORTH at pp. 123, 124); *Caballero v. Henty* (1874), 9 Ch. App. 447 (where the misrepresentation was that the public house being sold was in the occupation of a tenant, and it was held that it was no answer to the defendant's plea setting up this misrepresentation to say, "if you had gone to the tenant and inquired, you would have found out all about it": *per*

There is absolutely no exception to this rule (*l*). Thus it is of no avail to

JAMES, L.J., at p. 450); *Re Arnold, Arnold v. Arnold* (1880), 14 Ch. D. 270 (where it was urged that, if the representee had compared the plan with the particulars, or even noticed the discrepancies in the particulars themselves, he would have discovered that there was a blunder somewhere, which contention was forcibly answered by the observation of JAMES, L.J., at p. 281, cited in note (*q*), *post*); *Redgrave v. Hurd* (1881), 20 C. D. 1, C. A., where JESSEL, M.R., gives a very lucid exposition of the principles stated in the text as to the insufficiency of proof of mere means of knowledge, perfunctory inquiry, partial discovery, &c., and takes occasion to point out that FRY J.'s reading of *Atwood v. Small*, cited in note (*z*), *sup.*, was incorrect, in so far as he added "means of knowledge" to "knowledge," and was not justified by anything in fact decided by the House. This case is a particularly useful one, because in it all the three main types of proceeding for misrepresentation became the subject of the exposition, since the defendant defended the action, counter-claimed for rescission, and also counter-claimed for damages, in respect of one and the same misrepresentation; *Mathias v. Yettis* (1882), 46 L. T. 497, C. A. (*per* JESSEL, M.R., at p. 502, and Sir JAMES HANNEN at p. 504, to the same effect as in the last case); *Re London and Staffordshire Fire Insurance Co.* (1883), 24 C. D. 149 (where PEARSON, J., held, at pp. 154, 156, that the onus is on the representor to show that he *actually* brought home knowledge of the truth to the representee, and not that he did so by means which, in accordance with the statutory provisions of Table A, would, in all ordinary matters of business of the company, which this was not, have been deemed to amount to notice); *White v. Haymen* (1883), C. & E. 101 (*per* MATHEW, J., at p. 103, who held that a mere reference in a prospectus to other documents, assuming it to amount to constructive notice, would no more avail the representor than any other form of constructive notice); *Arnison v. Smith* (1888), 41 C. D. 348, C. A. (where Lord HALSBURY, L.C., at p. 370, points out that "it obviously lies on those who rely on a subsequent explanation to show that such explanation was quite clear," and then shows how, in the particular case, the representors had carefully wrapped up their pretended explanation in order "to avoid bringing to the notice of the plaintiffs the real facts of the case, whilst stating enough to enable the defendants to say that the plaintiff was informed of these facts"; to the same effect COTTON, L.J., at pp. 371, 372, and LINDLEY, L.J., at p. 373); and *Moss & Co. v. Swansea Corporation* (1910), 74 J. P. 351. Exactly the same rule prevails even in the case of mistake; see *Kelly v. Solari* (1841), 9 M. & W. 54. As to the Roman law on this point, see App. C, Sect. 2, Sub-s. (8). For the variations in the common law on this subject effected by statute, see Ch. XIII, *post*.

(*l*) The cases in which judges have dilated on the subject-matter of the misrepresentation being an "object of sense" form no exception to the rule: for, on a close examination of these, it will be apparent that in every one of them, except, perhaps, *Bailey v. Merrell* (1615), 3 Bulstr. 94 (where the plaintiff failed because he *might* have weighed the load), the fact that was really found, and on which the decision was based, was that the representee had actual knowledge of the properties or situation or quantity of the land or the qualities of the article, and the fact that the thing was palpable to the senses of any person who used them went a long way to induce such a finding, but there was always *some* evidence beyond this to justify it; see *Dyer v. Hargrave*, the first case cited in note (*k*), *sup.* So, in *Bawden v. London, Edinburgh, and Glasgow Assurance Co.*, [1892] 2 Q. B. 534, C. A., the defendants, being a corporation, could only see an "object of sense" with the eyes of an agent, and it was proved that this agent saw that the assured had only one eye: in other words, this was actual knowledge in the only way in which a company can have actual knowledge. On the other hand, see *King v. Wilson* (1843), 6 Beav. 124 (where it was strongly urged that the representee, being positively in occupation of the property, must have known its depth, but Lord LANGDALE, M.R., declined to impute any such knowledge to him, and there being no proof that he had actually measured it, the representor's contention failed: "I see no reason," he says at p. 129, "why he was to test the reiterated representation by an actual admeasurement"); *Biggar v. Rock Life Assurance Co.*, [1902] 1 K. B. 516, where WRIGHT, J., at p. 526, distinguished *Bawden v. London, Edinburgh and Glasgow Assurance Co.*, *sup.*; and *M'Millan v. Accident Insurance Co.*, [1907] Sc. Ct. of Sess. Cas. 484, where, in Scotland, this case was openly dissented from, though it was not really necessary to do so for the purposes of the decision. To take the simplest possible illustrations: a man sells to another, who has eyes to see, a vessel as sound, though it has a hole in its side as wide as a church-door, or as deep as a well: or a case of wine lying open, and represented to contain a dozen bottles, when in fact it is palpable to anyone who will count them that there are only ten; or a piece of land represented

show merely that the representee had the means of knowledge within his reach, the use of which would have enabled a person of ordinary business habits and normal sagacity to discover the real facts (*m*), and this, though the representor may himself have supplied such materials (*n*); nor is it even sufficient to show that the representor, "with all appliances and means to boot," had in fact made a cursory, or even a diligent, use of them, unless it be also proved that such investigation led to a revelation of the entire truth (*o*). The good sense of this is obvious. A man who has told even an innocent untruth, by which he has induced another to alter his position,—much more one who has fraudulently lied with that object and result,—has debarred himself from ever complaining in a court of justice, any more than he could in a court of morals, that the representee acted on the faith of his misstatement in the manner in which he, the representor, intended that he should. He can never be heard to resent the fact that another believed the lie that was told for the very purpose of inspiring that belief, or plead as an excuse that, if the representee had not been such a fool as to trust such a knave no harm would have been done (*p*). The representee never owed any duty to the representor

to be water-meadow land, with not a trace of water to be seen upon it, or the like: the fact that all these discrepancies between the object of sense and the representation *sautent aux yeux*, and are patent to the representee when the statement is made to him, would of course require very slight additional evidence to establish that he actually used his eyes, and, using them, saw the truth: but this additional evidence, slight though it be, is necessary: and if it be the proved fact that he did not choose to look at the ship, or the open case, or the field, or deliberately turned his back on it, fixing his averted gaze on the trusted representor, no knowledge would be established. In *Jones v. Edney* (1812), 3 Campb. 285, and *Flight v. Booth* (1834), 1 Bing. (N. C.) 370, 379, it was in vain argued that the representee *might* have heard the lease read out in the auction-room, or might have inspected it, there being no proof that in fact he had done so. So in *Shepherd v. Croft*, [1911] 1 Ch. 521, 528, 529, the representee *might* have peered down the hole in the garden, and so have discovered the watercourse, but she did not, and was not bound to. A second exception has been suggested in the case of the notice which is undoubtedly imputed by the provisions of the Companies Acts to an applicant for shares in a company of the contents of its memorandum and articles of association: but, here again, there is no real exception; for no such knowledge is imputed so as to deprive the applicant of his right to say that he was deceived by a misrepresentation which preceded the registration of these documents, as is carefully explained by Lord CRANWORTH at pp. 123, 124 of *Central Railway Co. of Venezuela v. Kisch* (1867), L. R. 2 H. L. 99; the importance of the imputation is that it marks the date from which, where the complaint is as to a misstatement of the objects of the company, it behoves the shareholder, in his own interests, to take prompt measures to repudiate, if he is intending to do so: see Ch. XI, Sect. 4, Sub-s. (5), *post*.

(*m*) See the cases cited in note (*k*), *sup*.

(*n*) See several of the same cases.

(*o*) *Ibid.*, particularly *Redgrave v. Hurd*, *sup*.

(*p*) See *Barley v. Walford* (1846), 9 Q. B. 197 (*per Cur.* at p. 209: "the defendant has no right to say that the plaintiff was wrong in giving him credit for what he said"); *Wilson v. Short* (1847), 6 Hare, 366 (*per WIGRAM, V.-C.*, at p. 377: "where A., dealing with B., makes a particular and distinct representation, material to the interests of B., I cannot admit that A. has a right to say to B. that he, B., should have doubted A.'s word, by reason of any general statement made by A., in which a cautious man might possibly have detected an inconsistency with the particular and distinct representation"); *Reynell v. Sprye*, *Sprye v. Reynell* (1852), 1 De G. M. & G. 660 (*per Lord CRANWORTH, L.J.*, at p. 710: "no man can complain that another has too implicitly relied on the truth of what he has himself stated"); *Price v. Macaulay* (1852), 2 De G. M. & G. 339 (*per KNIGHT-BRUCE, L.J.*, at pp. 346, 347: "no man can be heard to say that he is to be assumed not to have spoken the truth"); *New Brunswick and*

to be circumspect, or to be active in suspicion, or diligent in detective research; and, even if he ever had been under such a duty, it was the very office and effect of the misrepresentation to discharge him of it, and to put his mind at rest (*q*).

Sub-sect. (2). Agreement to waive Inquiry, or take all Risks, or accept with all Faults, or assume Facts, etc.

210. The above is a second affirmative plea available to the representor. Though at first sight appearing somewhat akin to the plea already considered, it is in reality antithetical to it. In the one case it is sought to establish that the representee was not deceived, because he knew the truth; in the other, that he was not deceived because he undertook,

Canada Railway and Land Co. v. Muggeridge (1860), 1 Dr. & Sm. 363 (*per* KINDERSLEY, V.-C., at p. 382); *Central Railway Co. of Venezuela v. Kisch* (1867), L. R. 2 H. L. 99 (*per* Lord CHELMSFORD, L.C., at pp. 120, 121: "when once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon the objector, 'You, at least, who have stated what is untrue . . . for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty'"); *Hunter v. Walters* (1871), 7 Ch. App. 75 (*per* JAMES, L.J., who, at p. 86, ridicules the notion that the representor is to be excused, because the representee *might* have discovered this, that, and the other: "it appears to me that the proper place for such an argument would be some satirical work ridiculing, by clever exaggerations, the doctrines of the Court of Equity with reference to constructive notice"); and *Mathias v. Yetts* (1882), 46 L. T. 497, C. A. (*per* JESSEL, M.R., at p. 502). Similarly, as regards misrepresentation for the purposes of estoppel in pais, in *Bloomenthal v. Ford*, [1897] A. C. 156, H. L., Lord HALSBURY, L.C., has some equally pungent and emphatic observations, at pp. 161, 162, on the idea that "it is competent for him"—the representor—"to turn round and say, 'You should have observed certain circumstances; and, if you had done that you would have been better advised than to have advanced the money'", or that "it is open to the person who made the representation to say, 'I told you so-and-so, but you ought not to have believed me. You were too great a fool. I had a right to mislead you, because you were too great a fool'"; and Lord HERSHELL, at p. 168, delivers himself to the same effect: "the very person who makes a statement of that sort has put the other party off making further inquiry. He has produced on his mind an impression as a result of which further inquiry is thought to be unnecessary or useless." Cp. also *Betjemann v. Betjemann*, [1895] 2 Ch. 474, C. A., a case of concealed fraud in relation to a plea of a statute of limitations, and the observations of LINDLEY, L.J., at p. 479, and RIGBY, L.J., at p. 482 ("what is the duty of a man to inquire? To whom does he owe this duty? Certainly not to the person who has committed the concealed fraud").

(*q*) And this, whether the misrepresentation was fraudulent or innocent. In several of the cases cited in the immediately preceding notes, it was innocent, or not alleged to be otherwise. The representor is in this dilemma, even on the assumption,—for which, however, there is no foundation,—that the representee owed any duty whatever to him to exercise care and caution: either the representor knew the truth, when he told the untruth, in which case he was fraudulent, and it does not lie in the wrong-doer's mouth to complain of the result which, by his fraud, he intended to bring about; or he believed what he said, and was innocent, in that he had not himself discovered the truth, in which case the observations of JAMES, L.J., at p. 281 of *Re Arnold, Arnold v. Arnold* (1880), 14 C. D. 270, C. A., a case where the misrepresentation was assumed to be innocent, apply with unanswerable force: "if a man makes a description calculated to mislead, I do not think that it is well for him to say, 'If you had been very careful, you would have found out the blunder.' How was it that he did not himself find it out? How can the vendors be heard to say that the purchaser ought to have found out for them this very blunder which they never found out for themselves?"

or agreed, to go on with the contract or matter which was the subject of the misrepresentation, in complete indifference as to what the truth was, or might turn out to be; in other words, because he neither knew, nor wanted to know the truth, but was so pleased with the prospect of profit and advantage to himself on the transaction, and so eager to conclude it, and bind the representor irrevocably without a moment's delay, that he was content to take upon himself all the risks, and dispense with all inquiry. The mutually exclusive character of the two defences is brought out and pointed by certain expressions made use of by JESSEL, M.R. (*r*), and, later, by HALSBURY, L.C. (*s*), in two remarkable judgments.

211. This affirmative plea, like the first (since both show that the representee was not misled, though for opposite reasons), is available whether the misrepresentation was innocent or fraudulent, and whatever the form of proceeding may be (*t*).

212. To prove merely that the representee *in fact* abstained from inquiry or investigation, as has already been shown (*u*), comes to nothing. It must be established by the representor that the representee *agreed or undertook* to waive all inquiry or disclosure of the misrepresented facts, and not to rely upon the representor's statements with reference to them. This agreement or undertaking, however, may be implied from acts and conduct, as well as expressed in a written or oral contract (*x*).

213. Where there is an express agreement, such as to take a chattel "with all faults," or land "with all risks as to errors in the particulars" (*y*), or to put up with a direct refusal to warrant (*z*), or to assume

(*r*) At p. 21 of *Redgrave v. Hurd* (1881), 20 C. D. 1, C. A.: "it must be shown either that he had knowledge of the facts contrary to the representation, or that he stated in terms, or showed clearly by his conduct that he did not rely upon the representation."

(*s*) At p. 369 of *Arnison v. Smith* (1888), 41 C. D. 348, C. A.: "unless it is shown that he knew the facts, or that he avowedly did not rely upon the statement, *whether he knew the facts or not*." So too, in cases of "mistake," where a defence of this character is set up to an action for money had and received, the defendant must show that "the money intentionally passed without any reference to the truth or falsity of the fact, the plaintiff meaning to waive all inquiry into it": *per* PARKE, B., at p. 59 of *Kelly v. Solari* (1841), 9 M. & W. 54.

(*t*) Consequently, the rules and authorities are dealt with here once for all (as in the case of the first affirmative plea), and, in Ch. XI, Sect. 4, Sub-s. (2), and Ch. XII, Sect. 2, it will be sufficient, when noticing the affirmative defence in question, to make reference to this Sub-section.

(*u*) See § 209, *sup*.

(*x*) See the passage from JESSEL, M.R.'s, judgment cited in note (*r*), *sup*.

(*y*) *Baglehole v. Walters* (1811), 3 Campb. 154; *Pickering v. Dowson* (1813), 4 Taunt. 779; *Schneider v. Heath* (1813), 3 Campb. 506; and *Ward v. Hobbs* (1878), 4 App. Cas. 13, H. L. These were all cases of actions for damages for fraudulent misrepresentation inducing the sale and purchase of a chattel. The first three related to a vessel, the last to animals. In all except the third—as to which see note (*t*) to § 215, *inf*.—the plea succeeded. As to a term in an agreement to take land "with all risks of errors in the particulars," see *Brownlie v. Campbell* (1880), 5 App. Cas. 925, 936, 937, 956, 957, H. L.

(*z*) *Bywater v. Richardson* (1834), 1 A. & E. 508 (alleged fraudulent misrepresentation, *inter alia*, as to the soundness of a horse; a rule of the repository, of which it was found that the plaintiff had notice, limited the warranty to 24 hours, and the alleged defect was not discovered till after that time: held that, from and after the expiration of the 24 hours, the plaintiff agreed to take the horse with all risks); and

the correctness of statements as to title, or of plans or measurements (*a*), or to waive any duty of disclosure or of exact statement, in a prospectus, imposed by statute or otherwise (*b*), the representee is *primâ facie* defeated (*c*), though the bar may be removed on proof of the matters mentioned below (*d*), the burden of establishing which, however, is thereupon shifted on to his shoulders. Thus, there may be an express condition or term in a contract, such as a policy of life insurance, that it shall not be impeachable for misrepresentation, *other than fraudulent*, at any time (*e*), or after the lapse of a certain period (*f*), or that, as in most contracts for the sale of land, it shall not be the subject of rescission and restitution, but only of compensation, in the event of any *innocent* misdescription (*g*); and such conditions and terms are valid and enforceable; but a condition or term in a contract that it shall not be impeachable for fraudulent misrepresentation, or any other species of fraud, is probably a nullity (*h*).

Ward v. Hobbs, *sup.* (where there was an express refusal to warrant, as well as a sale with all faults).

(*a*) *Re Banister, Broad v. Muntion* (1879), 12 C. D. 131, a case of rescission, where the representor set up a condition of sale requiring the purchaser to assume certain facts, which was *primâ facie* a good answer, but failed for the reasons stated in § 215 *inf.*, and note (*z*) thereto; *Re Sandbach and Edmondson's Contract*, [1891] 1 Ch. 99, C. A., where a plea to a similar action, setting up a similar condition, succeeded, *per* Lord HALSBURY, L.C., at pp. 103, 134; *Blaiberg v. Keeves*, [1906] 2 Ch. 175 (same point); *S. Pearson & Sons, Ltd. v. Dublin Corporation*, [1907] A. C. 351, H. L., an action for damages, where it was a term of the contract that the plaintiffs, the contractors, were to satisfy themselves of the accuracy of the information, drawings, and specifications supplied by the defendants' engineers—a good plea so far, but it failed, for similar reasons to those in the case last cited; and *Boyd and Forrest v. Glasgow and S. W. Railway Co.*, [1911] Sc. Ct. of Sess. Cas. 33 (a similar case): see again § 215, *inf.*, and note (*z*) thereto.

(*b*) See Buckley on Companies (9th edition), p. 181, and note (*m*) thereto, and Lord Halsbury's *Laws of England*, title, "Companies," vol. v, p. 125, and the cases cited in note (*k*) thereto, particularly *Greenwood v. Leather Shod Wheel Co.*, [1900] 1 Ch. 421, C. A. (where, however, the plea failed—see note (*z*) to § 215, *inf.*). All waiver clauses as to certain matters are now made void by sect. 81 (4) of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), but, as matters other than those specified in the section, the decisions above referred to are useful, and also generally as to the principles on which agreements to waive inquiry are held valid, or the reverse.

(*c*) *Baglehole v. Walters* (1811), 3 Campb. 154, *per* Lord ELLENBOROUGH, C.J., at pp. 156, 157: "where an article is sold with all faults I think it is quite immaterial how many belonged to it within the knowledge of the seller. The very object of introducing such a stipulation is to put the purchaser on his guard, and throw upon him the burden of examining all faults, both secret and apparent." This passage is cited and approved by Lord O'HAGAN at p. 27 of *Ward v. Hobbs* (1878), 4 App. Cas. 13, H. L.

(*d*) § 215, *inf.*

(*e*) As was the case in *Hemmings v. Sceptre Life Association*, [1905] 1 Ch. 365, where it had been agreed that the policy should not be avoided except for "wilful" misrepresentation. Cp. also *Wheelton v. Hardisty* (1857), 8 E. & B. 232, though the representor there only showed that a public announcement to this effect had been made by the insurance company, but not that it had come to his notice, or that he had accepted it by conduct; in other words, he failed to prove a concluded contract or contractual term.

(*f*) As in *Anstey v. British Natural Premium Life Association* (1908), 99 L. T. 765, C. A.

(*g*) See Ch. XI, Sect. 4, Sub-s. (3), *post*.

(*h*) See § 216, *post*.

214. An implied agreement to the above effect is of course infinitely more difficult to establish than an agreement in express terms. Though it is clear that such an undertaking or promise *can* be inferred from conduct (*i*), such conduct must be of a very emphatic and remarkable character to raise such an implication. In all the reported cases in which an attempt has been made to extract such a promise from the representee's positive acts, the representor, on whom the onus rests, has failed with scarcely a single exception in the case of proceedings to rescind (*k*), and with none, in the case of an action for damages (*l*). It should be noted that there are certain types of contract, such as compromises, and particularly family arrangements, the very nature of which is such that all parties are contemplated as starting the negotiations with the consciousness that their respective rights are unascertainable without complicated inquiries, and as tacitly consenting to an immediate definition and demarcation of those rights for the express purpose of not merely waiving investigation, but also of sparing themselves the trouble, time, worry, and expense involved in it (*m*). Here there is not merely a possible inference of an agreement to dispense with inquiry, but a rather strong presumption of it,—a presumption, however, which even in such cases may be rebutted by proof of actual facts showing a contrary intention on the part of one of the parties to the compromise or arrangement, to the knowledge of the others (*n*). Difficult as it is to make out an implication of an agreement to take all risks, and dispense with all information and disclosure, from acts, it is even more difficult to raise such an inference from mere inaction. In fact, delay in instituting proceedings, unless it amounts to such delay as exceeds any period of statutory limitation (*o*),

(*i*) See note (*s*), *sup*.

(*k*) See *Everitt v. Desborough* (1829), 5 Bing. 503 (where it was contended that the insurance company had taken upon themselves the burden of inquiry, and so had in effect agreed to dispense with the assured's information, but it was pointed out by PARKE, J., at p. 519, that even if this case had been properly framed or made, which was very doubtful, it certainly had not been proved). In *Seddon v. North Eastern Salt Co.*, [1905] 1 Ch. 326, JOYCE, J., did undoubtedly find that the plaintiff "intended to take the risk, whatever it was," as an "inference of fact from his conduct" (p. 335), but so many other, and much more cogent and convincing, reasons had previously been given for dismissing the action (see pp. 332-335) that it may be doubted whether this alone would have satisfied the court. The "affirmation" cases referred to in Ch. XI, Sect. 4, Sub-s. (4), *post*, where from the representee's subsequent conduct an inference is drawn that, having the right to choose between adhering to the contract and avoiding it, he elected to take the former course, stand on a totally different footing.

(*l*) There are many instances of a representee by reason of his conduct failing to prove inducement, and also of a representor proving an *express* agreement by the representee to waive all inquiry, in actions for damages, but it seems impossible to find a single instance of a plea of an *implied* agreement of such waiver *from conduct* having been made out.

(*m*) See Lord Halsbury's *Laws of England*, title "Family Arrangements," vol. xiv, pp. 546 *et seq.* The principle was recognized in the case cited in the next note.

(*n*) The presumption was rebutted in *Re Roberts, Roberts v. Roberts*, [1905] 1 Ch. 704, C. A. (see pp. 710, 711 of the joint judgment of Lord HALSBURY, L.C., VAUGHAN WILLIAMS and STIRLING, LL.JJ.).

(*o*) See the various treatises on the subject of the Statutes of Limitation.

of itself amounts to nothing, even when the proceedings are for the purpose of obtaining rescission or analogous relief (*p*), and still more clearly is this so when the claim is to recover damages for a fraudulent misrepresentation (*q*), though, with other circumstances, it may, or may not, constitute some evidence to negative the representee's allegation that he ever was deceived at all (*r*). Even with such circumstances, certainly without them, the delay may be satisfactorily explained (*s*).

215. It must be remembered, however, that even an express agreement, *a fortiori* an agreement sought to be implied from conduct, is wholly vitiated by proof of fraud on the part of the representor. Thus, an express agreement to sell with all faults, though it protects the representor from liability if there are faults, even to his knowledge, is no protection whatever if, besides knowing of those faults, he used positive means and devices to cover them up, or hide them away (*t*). Indeed, every such manoeuvre or artifice, since it amounts of itself to a falsehood by conduct, as has already been shown (*u*), may be regarded as a new and independent misrepresentation, to which the term requiring the representee to put up with "all faults" has no application. *Fraus est celare fraudem*. So where the representor expressly refuses to warrant the soundness of what he sells, or to sell otherwise than with all faults, but yet chooses to add a fraudulent statement that, so far as he knows and believes, the subject of the sale is free from some specified fault, the express term in the contract,

(*p*) See Ch. XI, Sect. 4, Sub-s. (7), *post*.

(*q*) *Peek v. Gurney* (1873), L. R. 6 H. L. 377 (*per* Lord CHELMSFORD at pp. 384, 385); *Eaglesfield v. Londonderry (Marquis)* (1876), 4 C. D. 693, C. A. (*per* BAGGALLAY, J.A., at p. 715, and BRAMWELL, J.A., at p. 717); *Redgrave v. Hurd* (1881), 20 C. D. 1, C. A. (*per* JESSEL, M.R., at p. 13); *Peek v. Derry* (1887), 37 C. D. 541, 576, 577, C. A.; and *Arnison v. Smith* (1888), 41 C. D. 348, 361, C. A.

(*r*) See the passages cited in the last note.

(*s*) As, for instance, by want of means, or of advice, or even (strange as such an allegation may seem to the professional mind) by proof that the representee believed that the law gave him no remedy whatsoever in respect of a contract even fraudulently induced. An explanation of the last-mentioned character was made by the plaintiff in the witness-box on the trial of an action of deceit, within the author's experience, as to the takings of a bakery and confectioner's business, and, though the delay had been enormous,—in fact, only just inside the statutory period,—the jury accepted the plaintiff's statement, and gave him the verdict.

(*t*) *Baglehole v. Walters* (1811), 3 Campb. 154 (*per* Lord ELLENBOROUGH, C.J., at p. 157, "unless the seller by positive means renders it impossible for the purchaser to detect secret faults": in that case, however, the plaintiff failed to prove the use of such "positive means"); *Schneider v. Heath* (1813), 3 Campb. 506 (where the representee succeeded, on proof that the representor had removed the vessel, which was to be "taken with all faults," from the ways in which she lay, and had kept her continuously afloat, so that her bottom and keel were always concealed, until the moment when the representee was given possession of her); *Ward v. Hobbs* (1878), 4 App. Cas. 13, H. L. (where, at p. 27, Lord O'HAGAN refers to, and adopts the proposition of Lord ELLENBOROUGH, C.J., cited *sup.*, but points out that, in the case before the House, "it has not been pretended that he"—the defendant—"was guilty of any contrivance" to conceal or disguise the disease from which the pigs were suffering); and, as to cases of a condition of sale that the sale shall not be annulled for any error or misdescription, or defect in title, but shall be the subject either of compensation, or of no relief at all, where such condition has been held to have no application if fraud be shown, see Ch. XI, Sect. 4, Sub-s. (3), *post*. As to the Roman law on this topic, see App. C, Sect. 2, Sub-s. (9).

(*u*) See Ch. III, Sect. 2, at § 58, and the cases cited in the notes thereto, *ante*.

and the express refusal to warrant, go for nothing, and he loses the protection they would otherwise give him (*x*) ; but such statement must be shown to be as clear and explicit and direct as the express term or refusal (*y*). And, in cases of sales of land, where there is a condition that the purchaser shall take such title as the vendor has, or shall assume certain facts, or where, in the case of a contract to execute works, there is a term that the contractors shall accept the accuracy of plans drawings or particulars furnished by the engineers, the condition or term is no bar to the representee's claim to relief if the representor, pretending not to know of any defect in title or inaccuracy of description, is shown to have been aware all the time of the defect or inaccuracy complained of (*z*) ; and, so far from being a defence to an action for damages for misrepresentation, constitutes strong evidence of the fraud which is required to establish it (*a*).

216. It was a principle of Roman jurisprudence that any promise or condition that a contract should not be impeached for fraud, is wholly inefficacious and invalid (*b*), and there is weighty authority in favour of the existence of such a principle in English law, on the broad ground that the interests of the community, and of mercantile morality, imperatively demand it (*c*), apart from the somewhat narrower ground, which is only applicable to proceedings for rescission, that a term to this effect, contained in the contract which is sought to be avoided, must necessarily be avoided at the same time, and that the part must go with the whole (*d*).

(*x*) *Per* Lord CAIRNS at pp. 20, 21 of *Ward v. Hobbs*, *sup.*

(*y*) *Ibid.*, at pp. 22, 23, *per* Lord CAIRNS.

(*z*) *Re Banister, Broad v. Muntion* (1879), 12 C. D. 131, where JESSEL, M.R., at pp. 142, 143, BRETT, L.J., at pp. 146, 147, and COTTON, L.J., at pp. 149, 150, point out that a vendor is not entitled to set up, as an answer to the action, a term or condition of this nature in respect of anything which the vendor knows not to be true, but only in respect of some fact of which he knows nothing ; *Brownlie v. Campbell* (1880), 5 App. Cas. 925, H. L., where the rule is recognized by Lord SELBORNE, L.C., at pp. 936, 937, though in this case no fraud was proved ; *Greenwood v. Leather Shod Wheel Co.*, [1900] 1 Ch. 421, C. A. (a case of alleged waiver, pursuant to a waiver-clause in a prospectus, where it was stated that "there may be contracts" which the statute then in force would require to be disclosed, implying that the representors did not know of any, whereas it was proved that they were cognizant of several, of the most vital materiality : held that the clause constituted no defence at all ; see, especially, the observations of LINDLEY, M.R., at pp. 435-437) ; *S. Pearson & Son, Ltd. v. Dublin Corporation*, [1907] A. C. 351, H. L. (an action for damages for fraudulent misrepresentations in plans, drawings, and specifications : *per* Lord LOREBURN, L.C., at pp. 353, 354, Lord HALSBURY at p. 356, Lord ASHBOURNE at pp. 359, 360, Lord JAMES at p. 362, and Lord ATKINSON at pp. 364-366) ; and *Boyd and Forrest v. Glasgow and S. W. Railway Co.*, [1911] Sc. Ct. of Sess. Cas. 33, 61, 76 (fraudulent misrepresentation in a "journal of bores" of the character of soil to be excavated).

(*a*) See the passages cited from the last two cases referred to in the preceding note.

(*b*) See App. C, Sect. 2, Sub-s. (11), *post*.

(*c*) This was the view of Lord JAMES at p. 362 of *S. Pearson & Son, Ltd. v. Dublin Corporation*, *sup.* ("as a general principle, I incline to the view that an express term that fraud shall not vitiate the contract would be bad in law"), and of Lord ATKINSON at p. 365.

(*d*) This was how it was put by CHITTY, J., at p. 444 of *Tullis v. Jackson*, [1892] 3 Ch. 440. He was, however, of opinion that there may be a valid agreement to abide by the decision of an arbitrator, and not to seek to set it aside even for fraud or collusion (see pp. 443-446), and this was the actual decision in the case.

Sub-sect. (3). Previous Avoidance of Contract.

217. Where the representee's alteration of position consisted in the entering into a contract with the representor, it is a good defence to an action or counter-claim for damages to allege and prove that, before writ issued or counter-claim pleaded, such contract had in fact been avoided by mutual consent (*c*) or by judgment of a court (*f*), just as, conversely, in proceedings for rescission, it is a good defence to allege and prove that before the commencement thereof the representee had in fact affirmed such contract (*g*); for, in either case, the election to pursue one, rather than the other, of the two alternative remedies, is shown to have been definitely exercised before the initiation of the proceedings (*h*). But such consent is not shown by mere proof of an offer not accepted—still less by mere disclosure or admission of the fact that a misrepresentation has been made, unaccompanied by such an offer (*i*). A clear offer of not only rescission, but complete restitution and indemnity, must be proved to have been made (*k*). And it must be remembered that the above only applies to a case where the contracting party was the actual representor; where the representation was, in fact, made by the agent of the contracting party (the directors of a company, for instance), the representee has still a right to recover against the agent, notwithstanding that the contract (whether by consent, or judgment) has been avoided, any damage he may have sustained by reason of his not having in fact obtained, or being able to obtain, from the contracting party the full restitution which had been agreed, or adjudged, to be made (*l*). If he has in fact recovered such full

(*e*) This was impliedly recognized in *Arnison v. Smith*, *inf.*

(*f*) See *Ship v. Crosskill*, *inf.*, where this was assumed.

(*g*) See Ch. XI, Sect. 4, Sub-s. (4), *post*.

(*h*) See Ch. IX, Sect. 1, *ante*, as to this right of election, and as to the impossibility of assuming the two inconsistent attitudes of affirmation and repudiation.

(*i*) *Arnison v. Smith* (1888), 41 C. D. 348, C. A., where the directors of a company, after the issue of a fraudulent prospectus, sent an "ambidextrous" circular to the applicants, by which they pretended at the trial that they had corrected their misrepresentations and revealed the truth; but it was held by the C. A., affirming *KEKEWICH, J.*, that not only had there been no such full and clear disclosure, but, even if there had been, the circular made no offer to restore the money paid, and, therefore, there was no ground for reducing the damages even, much less any defence to the action.

(*k*) *Arnison v. Smith*, *sup.*, per Lord HALSBURY, L.C., at pp. 369, 370: "if the directors had sent to each of the plaintiffs a notice to this effect, 'We have deceived you, and, if you like, you can have your money back,' the case would have stood very differently, and I reserve my opinion as to what would then have been the right course for the court to take. It may be that in such a case it would be held not reasonable for the plaintiffs to go on with their eyes open, and incur further damage." To the same effect *COTTON, L.J.*, at p. 372, and *LINDLEY, L.J.*, at p. 373.

(*l*) For instance, in *Ship v. Crosskill* (1870), L. R. 10 Eq. 73, the plaintiff had already succeeded in obtaining an order of the court for the rectification of the register of the company by the removal of his name therefrom, but, the company being in liquidation, he was unable to obtain the moneys which, by the same order, had been ordered to be repaid to him by the company. He subsequently sued the directors for the damage so sustained, and no one suggested that he had not a right to do so, but, as was pointed out by *ROMILLY, M.R.*, only if, as in any other action for damages, he could prove that the misrepresentation was fraudulent (which, when applying for rectification, was not necessary) and this he failed to do.

restitution, he has sustained no damage, and, on this ground, since damage is a necessary ingredient in the cause of action (*m*), his claim fails (*n*).

Sub-sect. (4). Statutory Defence in Cases of Oral, or Unsigned, Representations as to Credit.

218. Since the passing of the Statute of Frauds Amendment Act, 1828 (*o*), very frequently cited as Lord Tenterden's Act, there has been available to the representor a special affirmative defence to any action for damages in which the alleged misrepresentation, whether fraudulent or not, related to the credit of a third party, and was either made orally or not signed personally, by him (*p*). The above short title reflects the ordinary notion that the object of this statute was to extend the operation of the Statute of Frauds (29 Car. 2, c. 3), but this was certainly not its only object, as appears from its long title ("an Act for rendering a written memorandum necessary to the validity of certain *promises and engagements*"). There is no doubt, however, that one of its objects was to supplement the earlier statute in certain directions, where the experience of 150 years had shown it to be defective (*q*). It consists of ten sections, whereof sect. 6 is the section now to be considered. The Act does not extend to Scotland (*r*), but a provision to the same effect as the section in question, except in one important respect, and much more clearly and artistically expressed, is contained in a statute introduced 28 years later to meet the special mercantile requirements of that part of the United Kingdom (*s*).

219. The section is as follows :—

No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods [upon], unless such representation or assurance be made in writing, signed by the party to be charged therewith.

220. The drafting of the enactment leaves much to be desired. It is characterized by needless, if not misleading, reduplications of language

(*m*) See Ch. VII, Sect. 2, Sub-s. (2), *ante*.

(*n*) And, if some loss has been incurred before the offer to make full restoration has been made, the damage will be confined to such loss, and will not extend to further damage incurred by a representee "with his eyes open." See *Arnison v. Smith*, as cited in note (*k*), *sup*.

(*o*) This is the title to the statute which is given by the Short Titles Act, 1892. The regnal citation is 9 Geo. 4, c. 14.

(*p*) It only relates to actions for damages: an action or other proceeding for rescission of a contract induced by misrepresentation cannot be said to be an action "whereby to charge any person" within the meaning of Sect. 6. As to actions for money had and received, see § 222, note (*d*), *inf*.

(*q*) See App. A, Sects. 1, 2, *post*.

(*r*) See sect. 9 of the Act of 1828.

(*s*) This is sect. 6 of the Mercantile Law Amendment (Scotland) Act, 1856 (19 & 20 Vict. c. 60), as to which see App. D, Sect. 3, *post*.

and pleonasms (*t*): terms are used of a generality which, if interpreted literally, would make the section extend far beyond the limits which the legislature contemplated (*u*): and the harassed and hurried draftsman has left upon the roll the unfortunate derelict word "upon,"—tossed up, no doubt, on the cross-currents of conflicting instructions,—in obvious disconnection with anything else in the section. And for nearly a century this egregious misfit has been forced to stand in the pillory, imprisoned within brackets, exposed to the jeers of generations of lawyers, deprived of all syntactical or logical fellowship, and serving only to stimulate academical speculation as to how the intrusive fly ever got into the amber (*x*).

221. In all the decisions hitherto reported, the statutory plea has succeeded (*y*), or but for circumstances not connected with the nature of

(*t*) "Representation," for instance, is related to "assurance," as genus to species, and to speak of "any representation or assurance," is like speaking of "any animal or horse." Again "concerning or relating to" is a quite senseless use of two forms of expression to denote one and the same idea, for there cannot be any representation which "concerns" the conduct, etc., of another, which does not "relate to" it, or one "relating to" it which does not "concern" it. The former juxtaposition of words, moreover, is misleading, as well as unnecessary. It distinctly tends to encourage the notion that only those representations are aimed at which are in the nature of assurances, such as the guarantees which were the subject of the section of the Statute of Frauds (s. 4) which this enactment was intended to enlarge; the argument which was advanced, though it did not prevail, in the case cited in note (*a*), *inf*.

(*u*) Such as the terms "character," and "conduct." So also the expression "trade, or dealings" would *primâ facie* apply to all mercantile misrepresentations of whatever kind, and so would make the section give immunity to any oral misstatement as to another person's business transactions, or to any falsehood contained in an unsigned prospectus of a company. at least before the date at which they were first required by company legislation to be so signed. It is true that no great harm has been done as yet, or probably will be done hereafter, because, as in the case of sect. 38 of the Companies Act, 1867, the extreme generality of the language will, no doubt, if the occasion should arise, be confined within reasonable limits by a free judicial application of the *noscitur a sociis* principle, though in this case, considering that the supposed governing expression "credit" stands neither first, nor last, in the series of terms, six in number, which are employed, but in the middle, after "character and conduct," and before "ability, trade, or dealings," it would seem something of a violence to the section to select "credit" as the word with which the others are to be deemed *ejusdem generis*, rather than either "character" which begins the series, or "dealings" which ends it. And this seems to have been the view judicially entertained in at least one recent case—see note (*g*), *inf*.—a view for which, though it did not commend itself to the Court of Appeal, there is a great deal to be said. At all events, the mere fact that the view in question has been adopted by high authority illustrates the looseness of expression and draftsmanship to which reference has been made.

(*x*) Three theories of the genesis of the blunder are put forward in *Lyde v. Barnard* (1836), 1 M. & W. 101—(1) that "credit" and "money or goods upon" were somehow transposed, *per* GURNEY, B., at p. 104, ALDERSON, B., at pp. 109, 110, and PARKE, B., at pp. 115, 116; (2) that after "upon," the words "such representation or assurance" had been accidentally omitted or erased, *per* PARKE, B., at pp. 115, 116; and (3) that the word was originally "thereupon," which would make quite good sense, and that it was afterwards thought that, though the word was sensible, it was unnecessary, and that, in preparing the roll for Parliament, the person instructed to delete the word, hastily passed his pen through the first part of it only, leaving the remainder—"upon"—standing, *per* Lord ABINGER, C.B., at pp. 123, 124. Whatever be the correct explanation, it is certain that, with one consent, the courts have treated the word as meaningless and non-existent.

(*y*) *Lyde v. Barnard* (1836), 1 M. & W. 101 (where, the Court of Exchequer being equally divided, the non-suit by Lord ABINGER, C.B., at the trial stood); *Haslock v.*

the plea itself, would have done so (z). The representations affected by the section are not confined to representations of a similar character to those affected by sect. 4 of the Statute of Frauds (a), nor to those made solely for the purpose of obtaining credit for a third person, as distinguished from those made for that purpose and also for fraudulent purposes of the representor's own (b), nor to those by which it is intended to benefit such third person, as distinguished from those intended only for the representor's own benefit (c).

222. The section provides the representor with a defence, if he chooses to avail himself of it, to all actions for the recovery of damages, or, whether strictly they can be so regarded or not, all actions for money had and received, based on an alleged fraudulent misrepresentation (d), but not to actions for rescission, or for money had and received merely as part of the restitution and relief consequential upon such rescission (e). The burden of proof is, of course, upon the representor, and, if there were two representations as to credit, one oral and the other written and copied, the additional burden is on the representor to show that the representee

Fergusson (1837), 7 A. & E. 86; *Swann v. Phillips* (1838), 8 A. & E. 457; *Devaux v. Steinkeller* (1839), 6 Bing. N. C. 84; *Williams v. Mason* (1873), 28 L. T. 232; *Swift v. Jewsbury* (1874), L. R. 9 Q. B. 301, Exch. Ch.; *Pearson v. Seligman* (1883), 48 L. T. 842, C.A.; *Clydesdale Bank v. J. & G. Paton*, [1896] A. C. 381, H. L.; *Hirst v. West Riding Union Banking Co.*, [1901] 2 K. B. 560, C. A.; and *Parsons v. Barclay & Co.* (1910), 103 L. T. 196, C. A.

(z) In *Tallon v. Wade* (1856), 18 C. B. 371, Exch. Ch., where there were two representations, one oral and the other in writing, no one doubted that, if the plaintiff had been proved to have relied on the former alone, the plea would have succeeded: but the jury found, on what the Exchequer Chamber held to be a proper direction, that the plaintiff did not rely on the oral representation alone (*per* POLLOCK, C.B., at p. 385, WIGHTMAN, J., and CROMPTON, J., at p. 387, and BRAMWELL, B., at p. 388).

(a) *Devaux v. Steinkeller*, *sup.*, *per* TINDAL, C.J., at p. 88, and BOSANQUET, J., at p. 89, where it is pointed out that it is not until sect. 7 of the statute is reached that any mention is made of the Statute of Frauds at all. It is in fact amazing that the idea should have ever gained ground, as it most certainly has, that Lord Tenterden's Act was directed in substance to a revision of the Statute of Frauds, and still more astonishing that the framers of the Short Titles Act, 1892, should have perpetuated this error by authorizing it to be cited as the Statute of Frauds Amendment Act, 1828; for, on examining, first, the title given to it by the legislature *dum fervebat opus*, which has already been set out in the text, and then the subject-matter of its first seven sections—the other three relate merely to stamps, extent of Act, and date of commencement—it will be apparent how little the Statute of Frauds was in the mind of Parliament at the time. The first four sections purport to operate upon the provisions of two Statutes of Limitation which are recited in the preamble to those sections: sect. 5 relates to infancy, and has no reference to any statute at all; nor has sect. 6, the section now under discussion. A special preamble (referring to sect. 17 of the Statute of Frauds) is prefixed to sect. 7, which is the only enactment in the statute dealing with, or referring to, any part of the Statute of Frauds. There is no section which purports to affect the provisions as to guarantees in sect. 4 of the Statute of Frauds, which provisions have so persistently been supposed to have been the subject of the legislature's special solicitude in passing Lord Tenterden's Act.

(b) *Clydesdale Bank v. J. & G. Paton*, *sup.*, *per* Lord WATSON at pp. 390, 391, Lord HERSHELL at pp. 393, 394, and Lord DAVEY at pp. 396, 397, with regard to the (in this respect) similar clause of the Scotch statute referred to in note (s), *sup.*

(c) *Pearson v. Seligman*, *sup.*

(d) See *Haslock v. Fergusson*, *sup.*, where the action was so framed, in the vain hope of getting round the statute, and defeating the substance by the form.

(e) See note (p), *sup.*

relied solely upon the former (*f*). The burden of allegation is also upon the representor, in accordance with the modern practice (*g*), whatever may have been the rule before the Judicature Acts (*h*).

223. The signature required to defeat this plea is a personal one, and signature by an agent is not sufficient (*i*). This plainly appears from a comparison of the language of the section, and also of sect. 1 of the same statute,—in both of which the words, “or his agent thereunto lawfully authorized,” are significantly omitted—with the language of certain sections of the Statute of Frauds, where they are as significantly inserted (*k*). It follows that, as there can be no personal or physical signature by a corporate body, such body can always successfully plead the statutory plea to any action for damages based upon misrepresentation as to a third person’s credit, whether oral or written, made by any of its agents (*l*).

224. As to the six, or (counting “trade or dealings” as one phrase) the five, possible subject-matters of the class of representation falling within the section, “credit” explains itself; but the other terms, with the exception of “conduct,” have received judicial interpretation. Thus, a representation as to a man’s “ability” was held by two members of the Exchequer Chamber to comprise a representation as to incumbrances on that person’s property (*m*), though the other two members differed, being of opinion that such a representation relates only to a fund (*n*). A statement as to a third person’s “ability” or “credit” is none the less so, because the representor adds other facts, furnishing a reason why the person may be trusted (*o*). “Character” has been confined to “character for paying promptly” (*p*); and the expression “trade or dealings,” which, construed in the ordinary and literal meaning of the words, would include every sort of commercial transaction, has been held not to apply to such dealings as have no direct relation to the question of a third person’s credit (*q*).

225. The expression “another person” in the section contemplates of course some third person, physically and legally distinct from both the representor and the representee. A company in which the representor

(*f*) See *Tallon v. Wade*, and citations therefrom, in note (*z*), *sup*.

(*g*) See R. S. C., Ord. 19, r. 15.

(*h*) In several of the cases cited in note (*y*), *sup*., e.g. *Swann v. Phillips*, which was a demurrer, the statute was pleaded.

(*i*) *Williams v. Mason*, *Swift v. Jewsbury*, and *Hirst v. West Riding Union Banking Co.*, all cited in note (*y*), *sup*.

(*k*) *Hyde v. Johnson* (1836), 2 Bing. N. C. 776, was a similar decision on the similar words in sect. 1 of the statute.

(*l*) *Hirst v. West Riding Union Banking Co.*, *sup*.

(*m*) Lord ABINGER, C.B., and GURNEY, B., in *Lyde v. Barnard*, *sup*.

(*n*) *Ibid.*, per ALDERSON and PARKE, BB.

(*o*) *Swann v. Phillips*, *sup*., per LITTLEDALE, J., at p. 461, and PATTISON, J., at p. 462.

(*p*) This was the kind of “character” which was the subject of *Haslock v. Fergusson*, *sup*.

(*q*) *Bishop v. Balkis Consolidated Co.* (1890), 25 Q. B. D. 512, C. A., per Cur. at p. 522, differing from VAUGHAN-WILLIAMS, J., who, in the court below, had held that an oral representation that certain documents had been lodged with a company on a transfer of shares was a representation within the section.

might be the largest, or practically the sole, shareholder would still be "another person," and, though a firm is not a person, yet if A. makes a representation as to the credit of a firm consisting of himself and B., he is making a representation about "a third person," viz. B., and none the less because he is also making one about himself (r).

226. Where the statutory plea is raised, it has been said that, in cases of oral—as distinct from written but unsigned—representations, it is the preferable course to get a finding from the jury as to the matters to which the oral statement was intended to relate, if this question fairly admits of doubt, and then to rule on the question of law whether, accepting the finding of fact, the representation is within the section or not (s). In cases of written but unsigned, or not personally signed, representations, or where, in the case of any oral representation, there is no dispute or difficulty, either as to the substance or the meaning of the words used, all questions raised by the statutory plea are questions of law (t).

Sub-sect. (5). Misrepresentation by Agent within the Scope of his Authority, but for his own Ends.

227. Where a representee has made a *prima facie* case of fraudulent misrepresentation on the part of an agent of the representor, by proving facts from which an implication of authority in that behalf is to be made (u), the representor may rebut such *prima facie* case by establishing that, though the agent was, in making the representation, doing an act which otherwise might be deemed the act of his employer or principal, yet, having regard to the actual facts, he was making the representation neither for the purpose, nor with the result, of benefiting the principal, but on the contrary, with the intention of defrauding, or at least violating his duty to him as well as the representee, and for the sole purpose of benefiting himself, or some third person (x). Such facts, if proved,

(r) *Devaux v. Steinkeller*, *sup.*

(s) *Lyde v. Barnard*, *sup.*, per ALDERSON, B., at p. 111, and PARKE, B., at p. 112. The other course, viz. after a full and proper direction as to what legal consequences flow from what facts, to leave it to the jury to find for the defendant or the plaintiff, is quite permissible, and, as in cases of malicious prosecution, where "reasonable and probable cause" is in question, or in cases of defamation, where the dispute is as to whether the publication is protected or not, judges frequently adopt it in preference to the other.

(t) Most of the cases cited in note (y), *sup.*, were cases of either non-suit, or demurrer, or their modern equivalents.

(u) The burden of which is on him in the first instance. See Ch. VIII, Sect. 2, Sub-s. (4), *ante*.

(x) As in *Swift v. Jewsbury* (1874), L. R. 9 Q. B. 301, Exch. Ch., where the bank manager was shown to have made the misrepresentation he did for his own private ends, and not in the interest of the bank who employed him; *Hughes v. Twissden* (1886), 55 L. J. (CH.) 481 (a partnership case, per NORTH, J., at p. 485, quoting a passage from Lord Lindley's treatise: "a fraud committed by a partner whilst acting on his own separate account is not imputable to the firm, though, had he not been connected with the firm, he might not have been in a position to commit the fraud"); *British Mutual Banking Co. v. Charnwood Forest Railway Co.* (1887), 18 Q. B. D.

constitute a valid and complete answer to the *prima facie* case of authority made by the representee. It appears to be implied in some of the decisions that the burden is on the representee to establish that the representation was an act in fact done for the intended benefit of his employer, as well as an act of the kind which would ordinarily be supposed to be for his benefit, as being within the scope of his employment, and that, in all cases of the description now under consideration, when the defendant has succeeded, such success is due to the plaintiff's failure to sustain this full burden of proof (*y*); but it is surely more logical, and more consistent with the principles of pleading and evidence, to say that it is due to the defendant's failure to discharge the onus which is shifted on to him as soon as the plaintiff has proved that the representation belongs to the class of acts which the agent was impliedly authorized to do, and that, at the outset, the plaintiff is not called upon to do more than prove that the representation does so belong (*z*).

714. C. A. (where the defendant company's secretary having made a false statement to the plaintiff as to the validity of certain debenture stock, and the jury having found that he had been held out as a person to answer inquiries relating thereto, it was nevertheless proved that the falsehood was told without the actual knowledge or privity of the defendant company, and solely to serve the secretary's own fraudulent purposes, and those of a third person, his friend, and the C. A. accordingly, accepting the above finding of the jury, held that it came to nothing in face of the other proved facts which showed that the presumption of authority which would ordinarily flow therefrom could not be made in this particular case: *per* Lord ESHER, M.R., at pp. 716, 717, BOWEN, L.J., at pp. 717-719, and FRY, L.J., at p. 719); and *Lloyd v. Grace, Smith & Co.*, [1911] 2 K. B. 489, C. A., where a solicitor's clerk, having implied authority to advise clients as to their deeds, &c., and how they should be dealt with, induced a client by misrepresentation to execute conveyances of property to himself, and it was held that the solicitor could not possibly be liable, *per* VAUGHAN-WILLIAMS, L.J., at pp. 511-515, and FARWELL, L.J., at 509. The action here was not for damages, but for recovery of deeds, but the case is an authority for the proposition in the text. So, in the estoppel case of *George Whitechurch, Ltd. v. Cavanagh*, [1902] A. C. 117, H. L., the alleged representors succeeded, because, though the jury had specifically found that the representation was made *both* for the benefit of the alleged principals, and for that of the agent himself, there was, in the opinion of the House of Lords, no evidence whatever that the agent made it for any purpose but his own: *per* Lord MACNAGHTEN at pp. 124, 125, Lord JAMES at pp. 133, 134, and Lord BRAMFTON at pp. 139-141.

(*y*) It was apparently so thought by BOWEN, L.J., judging from his observation at p. 718 of *British Mutual Banking Co. v. Charnwood Forest Railway Co.*, *sup.*, that the representation in that case did not fall within "the class of acts" which the alleged agent was authorized to do, and that to say that it did, begged the question; but, surely, there can be no doubt that it did belong to such class, and that the correct way of putting the case was, whilst recognizing this, to point to the facts proved by the defendants, which destroyed the implication which would otherwise arise from its so belonging.

(*z*) There can be only one answer to the question, if the usual test is applied. Assume that uncontradicted evidence has been given by the representee that the fraudulent misrepresentation was of a kind which it was within the scope of the alleged agent's employment to make, and that, thereupon, no counter affirmative evidence is adduced by the representor. Who would, on that state of the evidence, be entitled to the verdict? Clearly the representee, which is the same thing as saying that, at that juncture, the burden is shifted on to the shoulders of the representor. And this was evidently the view of FARWELL, L.J., who, at p. 509 of *Lloyd v. Grace, Smith & Co.*, *sup.*, says: "It is open to him" (the defendant) "to dispute the existence and the extent of the authority, and to deny that the act was done for his benefit, and any such defence, if proved, will be a complete answer."

SECT. 3. MODE AND QUANTUM OF RELIEF—RULES OR THE ASSESSMENT OF DAMAGES.

228. In an action of deceit, or its equitable equivalent, the relief to which a successful plaintiff is entitled is damages, and damages only. There can be no question of undoing any contract or transaction, since the action is instituted and maintained on the basis that the representee has elected, or is compelled, by the application of certain rules of law to adhere to such contract or transaction; from which it follows that he can only be put back in the position in which he was before he altered it on the faith of the fraudulent misrepresentation (which is the purpose of all civil relief) by the recovery of a gross sum in money, which is to compensate him (so far as money can) for the loss which he has suffered down to the date of trial, and also such loss (if any) as he must necessarily suffer in the future under the provisions of the contract which he is fixed with, or otherwise. What “damage” means in law, and what causal connection must be established between it and the misrepresentation, are subjects which have already been discussed (*a*); but there are also certain principles of law upon which, where damage exists, the amount thereof is to be computed.

229. The governing principle is that the sum to be awarded must represent neither more nor less than the total amount of the moneys irrevocably paid away, and the value of property irrevocably parted with, by the representee in consequence of having altered his position in the manner proved, and also (since the damage must be assessed once for all) the present value of all moneys payable and property transferable by virtue of any liability assumed in consequence of such alteration of position, less the amount of moneys or value of property received and receivable by the representee in virtue of any contract or transaction induced by the misrepresentation.

230. The simplest type of case is that in which there is only one side to the account, that is to say, where the representee has sustained a loss of a specific chattel (*b*), or has paid, or is liable to pay a definite sum of money, and has received nothing, provided, of course, that the property or sum so delivered or paid is irrecoverable in law (*c*), or in business, by reason of the insolvency of the deliverer or payee (*d*), or, if it is a case of liability to pay, that there are no valid grounds for disputing it (*e*). In

(*a*) See Ch. VII, Sect. 2, Sub-s. (1), *ante*, and, as to the questions of law and fact involved in the determination of these matters, Sub-s. (2) thereof.

(*b*) As in *Mullett v. Mason* (1866), L. R. 1 C. P. 559 (loss of cows by disease).

(*c*) Examples of such cases are *Richardson v. Sylvester* (1873), L. R. 9 Q. B. 34 (expenses incurred), *Wilkinson v. Downton*, [1897] 2 Q. B. 57 (*quoad* the sums paid for railway fares), and others cited in the notes to Ch. VII, Sect. 2, *ante*.

(*d*) As in *Mackay v. Commercial Bank of New Brunswick* (1874), L. R. 5 P. C. 394, and in the cases of misrepresentation of a third person's credit, cited in note (*p*) to § 204, *ante*.

(*e*) See *Polhill v. Walter* (1832), 3 B. & Ad. 114, and, generally, the cases of fraudulent misrepresentation of authority cited in the notes to Ch. IX, Sect. 3, Sub-s. (2), *ante*. A case where it was necessary to institute a comparison between the present

such cases, it is simply a matter of addition, coupled (in the case of liability to future periodical payments) with an estimate, according to well known mathematical and accountancy rules, of the present value of such liability, and no balance has to be struck.

231. It is where the representee's alteration of position assumed the form of a contract with the representor, or with a third person, and where usually there are two sides to the account, and a balance has to be struck, that nice questions as to the quantification of damages have arisen. But the rules applicable may now be said to be completely and definitely established. On one side of the account must be placed everything that the representee has paid, and the proved value of everything he is compellable to pay in the future, including the value (to be assessed) of any property or advantages, estimable in money, which he has transferred, or is compellable to transfer in the future, pursuant to the terms of the contract. On the other side is to be placed all money, or the value of all property which he has received, or is entitled in the future to receive (here again the present value is to be estimated), under the same contract (*f*). If the real value of the items on the right-hand side of the account is *nil*, which has not infrequently been found to be the case (*g*), the representee is entitled to the whole amount of the items on the other side, which is "the ultimate, final, highest standard of his loss" (*h*). On the other hand, if the credit items are a complete equivalent, he has sustained no damage at all (*i*).

232. There never has been any serious doubt as to the soundness of the general proposition stated above, but questions have arisen, and have provoked discussions of a solemnity and length quite disproportionate to the merits or plausibility of the arguments advanced, as to what "value" must be taken to mean, when applied to the property or benefits acquired by the representee under the contract, and also as to the date at which these values must be ascertained.

233. It is now well settled that the value of any property or rights or benefits received by the representee means their real or actual value, to be determined by reference to the evidence adduced (*k*), and without reference to current or market prices in the case of marketable securities, where such prices are wholly artificial, and the mere manufacture and creation of the very company or persons whose fraud has given the representee his right to damages; or, in other words, "value" means the price which the shares or other property would have fetched as between reasonable and honest sellers and purchasers, if the whole truth of the value of liabilities, and the present value of probable future benefits, is *Pontifex v. Bignold* (1841), 3 M. & G. 63, *per* MAULE, J., at p. 82.

(*f*) See *McConnell v. Wright*, [1903] 1 Ch. 546, C. A., *per* COLLINS, M.R., at pp. 554, 555, where a lucid exposition of the general rule is to be found.

(*g*) See *Twycross v. Grant*, No. 1 (1877), 2 C. P. D. 469, C. A., where the jury, and *Jury v. Stoker* (1881), 9 L. R. (Ir.) 385, and *Thomson v. Ld. Clanmorris*, [1900] 1 Ch. 718, C. A., where the judge so found.

(*h*) *McConnell v. Wright*, *sup.*, at pp. 554, 555.

(*i*) *Ibid.*, at p. 555.

(*k*) *Pearson v. Wheeler* (1825), Ry. & M. 303; 27 R. R. 751 (a case of fraudulent misrepresentation of the takings of a public house, *per* ABBOT, C.J., at p. 304); and the authorities cited in the next note.

facts which the representors had perverted or concealed had been within the knowledge of those fixing the price (*l*). The ascertainment of the real value, in this sense, usually results in reducing the figure to be deducted, and proportionately enhancing the damages (*m*), but it sometimes operates in the opposite direction, and it is the representor who adduces the evidence with the view of aggravating the former sum and minimizing the latter (*n*).

234. The date at which this real value is to be assessed is the date at which the property was acquired, or (in the case of shares or other like securities) the date of allotment or transfer (*o*). The representee is not bound to sell on discovery of the fraud, or at any time afterwards, but if he chooses to do so, the sum which he in fact receives on the sale stands in the place of the sum which the tribunal would otherwise have to assess as the actual money's worth of the property when acquired, and no question of valuation or value arises (*p*). This rule, however, is subject to the obvious qualification that, if the representee sells in the market or otherwise after the lapse of more than a reasonable time from the date of his discovery of the truth, though he is always bound to give credit for at least that sum, it does not follow that, as against the representor, he may not be bound to give credit for more, or that the real value of the property at the date of acquisition is no longer to be considered; for if the price has been depreciated in the interval from causes entirely independent of the representor's fraud, and not arising (in the case of shares) from the intrinsic defects in the company's undertaking and affairs which were the subject of the misrepresentation, the money actually obtained on the sale, if less than the real value at the date of allotment or purchase, is deemed wholly irrelevant to the inquiry (*q*).

(*l*) *Twycross v. Grant*, No. 1 (1877), 2 C. P. D. 469, C. A., per Lord COLERIDGE, C.J., at pp. 489–491, in the C. P. D., and per BRAMWELL, L.J., at pp. 503–505, COCKBURN, C.J., at pp. 542–546, and BRETT, L.J., at p. 546, in the C. A.; *Jury v. Stoker*, *sup.*; *Arkwright v. Newbold* (1881), 17 C. D. 301, C. A., per FRY, J., at pp. 312, 313 (it was not necessary for the C. A. to consider the question, because they reversed the judgment given by FRY, J., in favour of the plaintiff); *Peek v. Derry* (1887), 37 C. D. 541, C. A., per COTTON, L.J., at pp. 591–593, and Sir JAMES HANNEN, and LOPES, L.J., at p. 594 (the discussion as to damages, and the principles laid down by the C. A. with reference thereto are of course unaffected by the subsequent reversal of the decision itself by the H. L.); *Glazier v. Rolls* (1889), 42 C. D. 436, C. A., per KEKEWICH, J., at p. 455 (here again the rule laid down is in no way impeached by the subsequent reversal by the C. A.); *McConnell v. Wright*, *sup.*, per COLLINS, M.R., at pp. 552–555, ROMER, L.J., at pp. 556–558, and COZENS-HARDY, L.J., at p. 559; *Cackett v. Keswick*, [1902] 2 Ch. 456, C. A., per FARWELL, J., at p. 468, whose decision was affirmed by the C. A.; and *Shepherd v. Broome*, [1904] A. C. 342, H. L., per Lord LINDLEY at pp. 347, 348, approving what had been said on this subject in the courts below, reported *sub nom. Broome v. Speak*, [1903] 1 Ch. 586, C. A., per BUCKLEY, J., at p. 605, and, in the C. A., COLLINS, M.R., at pp. 622, 623, and COZENS-HARDY, L.J., at p. 630.

(*m*) As in all the cases cited in the last note.

(*n*) As in *Pearson v. Wheeler*, *sup.*, where ABBOT, C.J., admitted the evidence of the defendant's surveyors to reduce the damages.

(*o*) *Peek v. Derry*, *Glazier v. Rolls*, *Cackett v. Keswick*, *McConnell v. Wright*, and *Shepherd v. Broome*, *sup.*, at the pages respectively cited in note (*l*), *sup.*

(*p*) *Peek v. Derry*, *sup.*, passage cited in note (*l*), *sup.*

(*q*) *Waddell v. Blockey* (1879), 4 Q. B. D. 678, C. A.; and *Peek v. Derry*, as cited in note (*l*), *sup.*

235. It is the duty of the representee to minimize the damages in the interests of both parties, if the representor offers him a real opportunity of so doing. Thus a defrauded shareholder who elects to keep his shares, and is bound therefore to pay calls on them, would not be justified in heaping up the damages by continuing to pay such calls with his eyes open, after a sincere and *bona fide* offer by the company, or its directors, to avoid the contract, and restore everything received by them under it; but a mere half-hearted and ambiguous admission of misstatements in a prospectus, unaccompanied by such an offer, would clearly leave the representee entitled, and bound, to go on meeting all payments due under the contract, and adding them to the damages (*r*). Still more unavailing, either to extinguish or to reduce the damages, is the mere fact that shortly after the date when the representee acquired the shares the company made good its representation, for the material date, as already stated, is the date when the representee took the shares, and "the damage might have been assessed there and then" (*s*).

236. It is important to bear in mind that, even in those cases where there is no necessity to assess or calculate values, and the sums sought to be recovered are fixed sums (*t*), or where the damages have, so to speak, liquidated themselves (*u*), the relief sought is still, in contemplation of law, nothing but damages. Thus, where the value of the property acquired under a contract is *nil*, so that the plaintiff has nothing to give credit for, and sues simply for the liquidated sums he has paid, he cannot, by labelling his action "money had and received," alter its intrinsic nature, or escape the disabilities attaching to an action of deceit, such as incapacity to sue for an innocent misrepresentation, or to recover from the estate of a deceased representor (*x*). On the other hand, the application of this principle sometimes operates for the benefit of the representee, and not to his detriment. For instance, where, as in the case of a completely executed contract, it may be necessary to establish that the real object of the action is to recover damages, and not to rescind (which might not be permissible in such a state of the facts), it is obviously of vital importance in the interests of the representee to invoke the aid of the rule which says that a sum, though liquidated, may nevertheless be damages, whether capable of being also called "money had and received," or not (*y*).

237. The above rules state the utmost limit of the damages which can be recovered in an action of deceit. It is quite clear that such an

(*r*) See *Arnison v. Smith* (1888), 41 C. D. 348, C. A., per Lord HALSBURY, L.C., at pp. 369, 370.

(*s*) *McConnell v. Wright, sup.*, per COLLINS, M.R., at p. 553.

(*t*) As in the cases cited in the notes to § 230, *sup.*

(*u*) As in the authorities cited in note (*g*) to § 231, *sup.*

(*x*) See *Ship v. Crosskill* (1870), L. R. 10 Eq. 73, and *Manners v. Whitehead* (1898), 1 F. 171, as to the former incapacity; and, as to the latter, *Re Duncan, Terry v. Sweeting*, [1899] 1 Ch. 387, per ROMER, J., at pp. 390 and 392.

(*y*) *Kettlewell v. Refuge Assurance Co.*, [1908] 1 K. B. 545, C. A., per Lord ALVERSTONE, C.J., at p. 550.

action "is not an action of contract, and, therefore, no damage in respect of prospective gains which the person contracting was entitled to expect comes in" (z). To take a simple case: I give £40 for a chattel, which is fraudulently misrepresented to me to have no defects. I proved that when I took delivery of the chattel, its real value was £5. I am entitled to £35 damages. I am not entitled to go into evidence to show that, if the chattel had been as represented to be, I was in the favourable position at the time of reselling it at once for £100, nor can I recover this anticipated profit of £60, much less both the £60 and the £35. In the one case, I am applying to an action of tort the measure of damages applicable only to breaches of contracts. In the other, I am seeking to get the benefit of both measures at once. Attempts, however, have from time to time been made, not indeed to obtain the latter or cumulative form, but the former, or substituted, kind of relief, under the guise of a supposed but wholly untenable theory that the law can award as damages the difference between what the property was worth, and what it would have been worth if it had answered to the description, which is neither more nor less than to turn the representee into a purchaser, the representor into a vendor, and the action of deceit into an action for a breach of a contract of sale. Such attempts, therefore, which are really an off-shoot of the "making good" heresy (a), have always failed (b), though diligent search may extract occasional unguarded expressions from some of the authorities, which, by themselves, and regardless of the context or subject-matter, would tend to encourage such a delusion (c).

238. It is convenient to notice here a view which has sometimes been

(z) *McConnell v. Wright, sup., per COLLINS, M.R.*, at p. 554.

(a) See Ch. IX, Sect. 3, Sub-s. (1), *ante*.

(b) Thus one of the many impossible arguments as to the measure of damage which were unsuccessfully urged upon the C. A. in *Twycross v. Grant, No. 1* (1877), 2 C. P. D. 469, C. A., was the contention that the proper measure was the difference (if any) between the real value of the plaintiff's shares when he acquired them, and the value which they would have had if the representations in the prospectus had been true. This was put forward in the interests of the representor, the suggestion being that the shares would have been equally valueless if the facts represented had existed. On the other hand, a similar contention was raised in the interests of the representee in *Cassaboglou v. Gibbs* (1883), 11 Q. B. D. 797, C. A., and met with the like fate, the plaintiff in vain contending that, his agent having misrepresented to him that a contract had been made on his behalf with a third person, he was entitled to recover the loss of profits which he would have made on such contract, if it had been entered into; which, it was held, was to treat the action as if it were an action for breach of contract by vendor against vendee, and was wholly erroneous, the only damages recoverable being the expenses to which the plaintiff had been put by reason of acting on the misrepresentation.

(c) See *Pontifex v. Bignold* (1841), 3 M. & G. 63, where the plaintiff, who had been induced by the fraudulent misrepresentation as to its affairs of a life insurance society to effect an insurance, sued for damages, stating in the declaration that "the policy was of much less value to the plaintiff than if the said representations had been true." On demurrer, the court held that this was good, and MAULE, J., at p. 82, put his decision on the ground that the policy "may not be equally secure, and may be of different value," an expression which would seem to support the erroneous view mentioned in the text, but which probably meant no more, or at any rate could not correctly have meant any more, than that the present value of the future premiums payable might be greater than the present value of the prospects of recovering the policy money on the death of the insured.

put forward in argument, and even now derives countenance from at least one treatise of high authority (*d*), that, in an action framed, not in deceit, but purely for breach of contract or warranty, the plaintiff is entitled to a larger measure of damages if the express or implied representation constituting the warranty or term of the contract was fraudulent, than if it was innocent, and nothing more is established than a mere breach of such warranty or term. It requires, however, very little thought to see that such a contention is totally opposed to all the principles on which civil compensation is awarded for breaches of contract (*e*), and very little research to discover that there is not a single decision to support it, whilst there are several judicial pronouncements to the direct contrary. Thus, it was forcibly observed by Lord BLACKBURN (then BLACKBURN, J.), in general terms, when dealing with this contention: "I do not see how the evidence of misconduct can alter the rule by which the damages for a breach of contract are to be assessed; it may render the contract voidable on the ground of fraud, or give a cause of action for deceit, but surely it cannot alter the effect of the contract itself" (*f*). As regards contracts for the sale of goods, the two decisions usually relied upon as countenancing the theory in question contain no dictum even in its support, and, so far as the actual decisions are concerned, tend to show that exactly the same measure of damages is recoverable in the one class of case as in the other (*g*). And, as regards contracts for the sale

(*d*) Benjamin on Sales, Book V, Part II.

(*e*) "In civil causes and trespasses, the law doth rather consider the damage of the party wronged, than the malice of him that was the wrongdoer": Bacon's Maxims of the Law, Reg. VII.

(*f*) At p. 594 of *Sikes v. Wild* (1861), 1 B. & S. 594.

(*g*) In *Mullett v. Mason* (1866), L. R. 1 C. P. 559, which was an action for damages for fraudulent misrepresentation of the soundness of a cow (in fact infected with the cattle-plague), it was held that the plaintiff was entitled to recover the value not only of the particular cow, which died of the disease, but also of five others with which it had been placed, and which also became infected, and died, on the ground that the representor was liable "for all the direct consequences which naturally flow from it" (*sc.* the misrepresentation). But, after saying this, ERLE, C.J., at pp. 563, 564, proceeds to add: "I do not stop to inquire what would have been the amount of the damages if there had only been the warranty" (it appears that the plaintiff also alleged breach of warranty); and WILLES, J., at pp. 563, 564, also says: "I agree with my Lord that it is unnecessary to say what the plaintiff would be entitled to recover if he rested his case only on the warranty." These expressions appear to have encouraged the erroneous notion referred to in the text, but, from the decision in the subsequent case of *Smith v. Green* (1875), 1 C. P. D. 92, where the circumstances were exactly similar, except that the jury negatived the fraudulent misrepresentation alleged,—so that the plaintiff there had to "rest his case only on the warranty,"—precisely the same kind of damages were given, on the ground that the defendant knew that the plaintiff was a farmer, and that, therefore, in all probability the cow in question would be placed with others. BRETT, J., at p. 95, says: "we are not called upon to decide in this case whether a defendant is liable to a greater measure of damages for a fraudulent misrepresentation on the sale of a horse, or cow, or any other chattel, than for a breach of warranty. I think it better to follow the example of the court in *Mullett v. Mason*, and decline to give any judgment on a point which does not fairly arise before us"; and to the same effect GROVE, J., at p. 96. But, though the judges in both these cases declined to lay down any proposition in terms, the two decisions themselves, when compared with one another, establish the rule; and that rule is that, whether the warranty be proved to have been also a fraudulent misrepresentation or not, the damages, both in the one case and in the other, are

of land, there is the direct authority of the House of Lords to the same effect, and that notwithstanding a strong temptation to abrogate an admittedly anomalous rule by creating an exception upon the exception (*h*). The Roman jurists, no doubt, held otherwise : but this was because their system of civil relief was largely influenced, in all its departments, by considerations of personal morality and motive, and the punishment of the defendant's misconduct was always considered an object of at least as much importance as the recoupment of the plaintiff's loss (*i*).

239. In actions of deceit, as in all other actions for damages or the recovery of unliquidated sums, any difficulties which arise in the quantification of the damages from the fraud or fault of the defendant, operate to his disadvantage, and not to that of the plaintiff, on the sound principle of *omnia præsumuntur contra spoliatores*. If he has deliberately destroyed, or carelessly complicated, the means of arriving at an accurate result, it is he who must suffer. The law will presume the most, and the worst (*k*).

240. The damages are assessed in the following manner. In the King's Bench Division, subject to the question of law whether there is any evidence of damage at all (*l*), the jury, if there is one, determines this issue, in accordance with the principles of law above stated as to the measure of damage, on which they will be directed, if necessary, by the judge. If there is no jury, the judge determines both law and fact. In either case, questions of calculation and figures may be referred to an officer of the court, such as an official referee (*m*). In the Chancery Division, the function of the judge is ordinarily limited to determining whether there is evidence of damage sufficient to support the action : if he decides that there is, and only in that event, he directs an inquiry as

precisely the same, viz. neither less nor more than the loss naturally and probably resulting in the circumstances of the case from the wrongful act of the defendant.

(*h*) *Bain v. Fothergill* (1874), L. R. 7 H. L. 159, where two things were decided—(1) that, though in cases of sale of goods, the purchaser is entitled as damages for breach of contract to his loss of profit, in cases of sale of land he is only entitled to repayment of his expenses, and not to compensation for the loss of his bargain, where the vendor fails to make out a title; and that this distinction, though in the opinion of many learned writers anomalous and indefensible, has been established for too long a time to overrule it; and (2) that, the exception or anomaly (if it be so) being settled law, it cannot be abrogated or emasculated by holding that it does not apply in cases where the vendor knew that he had no title, and was therefore fraudulent in pretending that he had, and that such considerations are irrelevant to the question of the quantum of civil compensation for breach of a contract, or of an express or implied term or condition thereof : *per* Lord CHELMSFORD at pp. 206, 207, and Lord HATHERLEY at p. 212.

(*i*) See App. C, Sect. 2, Sub-s. (3), *post*.

(*k*) See *Armory v. Delamirie* (1722), 1 Sm. L. C. 356, and the cases cited in the notes thereto in that treatise, and *Leeds (Duke) v. Amherst (Earl)*, No. 2 (1850), 20 Beav. 239, for the principle in its general application to wrongful acts, whether at common law or in equity. The first case was one of detinue at common law; the second was one of equitable waste, in which a very curious and interesting judgment, profusely garnished by quotations from Ovid, the Digest, the New Testament, and Sir Edward Coke, was delivered by SHADWELL, V.-C.

(*l*) See Ch. VII, Sect. 2, Sub-s. (2), as to this.

(*m*) R. S. C., Ord. 36, rr. 57, 57A.

to damages (*n*), to be conducted either in chambers or before an official referee ; but, occasionally, where the amount of the damages is liquidated, or easily ascertainable on the spot, or admitted, or where expense will be saved by making a rough and ready estimate, the court fixes the amount as part of its judgment (*o*). Where the representor is insolvent, whether an individual or a company, the right to damages may in some cases be the subject of a proof or claim in the bankruptcy or liquidation, as the case may be, in which event, unless the amount claimed is admitted by the trustee in bankruptcy, in the one case, or by the liquidator in the other, the judge of the King's Bench Division in bankruptcy, or the judge of the Chancery Division having jurisdiction in the winding up of companies, assesses the damages ; in other cases, a proof or claim is not allowed, and an action must be brought. Ordinarily speaking, a representee cannot prove against the estate for unliquidated damages for a tort, but may for a debt (*p*). Amongst such debts, however, are included claims to property or money which is earmarked, or can be traced, the liability to restore which is regarded as an equitable debt (*q*). In cases where the defendant makes default either in appearance or in pleading, the plaintiff is entitled to enter interlocutory judgment, and have the damages assessed by a sheriff's jury, pursuant to a writ of inquiry, subject to the power of the court to direct that they shall be ascertained by any other procedure (*r*).

SECT. 4. QUESTIONS OF LAW AND FACT.

241. In every one of the stages of the plaintiff's proof in an action for damages for fraudulent misrepresentation, questions of law may arise. What these are, has been already explained in the respectively appropriate

(*n*) See *McConnell v. Wright*, [1903] 1 Ch. 546, C. A., and *Shepherd v. Broome*, [1904] A. C. 342, H. L., in both of which cases the question was debated as to what amount of *prima facie* evidence of damage will justify the court in ordering an inquiry.

(*o*) This course was adopted by FRY, J., in *Arkwright v. Newbold* (1881), 17 C. D. 301, C. A. It was not necessary to consider the propriety of it in the C. A., because the judge's decision in favour of the plaintiff was reversed, but the appellants did not complain of the extempore mode of assessment, on the assumption (which they successfully combated) that the defendant was liable at all. In *Jury v. Stoker* (1881), 9 L. R. (Ir.) 385, SULLIVAN, M.R., assessed the damages at the full price paid, thinking the shares of no value at all, but offered an inquiry to the defendant, if he thought he could prove otherwise.

(*p*) As to bankruptcy, see *Re Giles, Ex parte Stone* (1889), 61 L. T. 82 ; *Greenwood v. Humber & Co. (Portugal), Ltd.*, [1898] W. N. 162 ; and Lord Halsbury's *Laws of England*, title "Bankruptcy," vol. ii, p. 198. A claim for damages for fraudulent misrepresentation is a "mutual debt" which may be set off against a claim by the trustee under the contract said to have been induced thereby : *Tilley v. Bowman, Ltd.*, [1910] 1 K. B. 745, following *Jack v. Kipping* (1882), 9 Q. B. D. 113. The rules in bankruptcy as to debts provable are made applicable to the liquidation of companies by sect. 207 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69).

(*q*) See *Read v. Bailey* (1877), 3 App. Cas. 94, H. L., per Lord CAIRNS at pp. 99, 100, and Lord BLACKBURN at pp. 102-104 ; *Phosphate Sewage Co. v. Hartmont* (1877), 5 C. D. 394, C. A., per MALINS, V.-C., at p. 441, whose decision was affirmed by the C. A. ; and *Ex parte Adamson, Re Collie* (1878), 8 C. D. 807, per JAMES, L.J., at pp. 818-821.

(*r*) R. S. C., Ord. 13, r. 5, and Ord. 27, r. 4.

places (s). So, as regards the necessary ingredients in any affirmative plea set up by the defendant in answer to such an action, other questions of law may arise, which also have been the subject of discussion (t). Every matter which is not a question of law is a question of fact (u). When a question is loosely described as a "mixed question of law and fact," what is really meant is that the question is a complex one, divisible into several contributory questions; but each of these contributory questions must, taken singly, be either of fact or of law; none of them can be compounded of both.

SECT. 5. PARTIES.

242. It has already been explained what persons are deemed in law parties to a representation (x). It now becomes necessary to inquire what persons, besides the representee and the representor, may in certain events be parties to an action for damages for fraudulent misrepresentation—in other words, what title is acquired, or liability assumed, when the representee or the representor is under disability, or deceased, or when there is an assignment *inter vivos* (y).

Sub-sect. (1). Who may sue.

243. Where there is no question of incapacity, death, or assignment, only the representee (z) can sue. Where, however, the representee dies after the date of the fraudulent misrepresentation, whether before or after action brought, his personal representatives may sue, or continue the action, for damages, as the case may be (a). On insolvency, the right to sue for and recover such damages, as in the case of any other wrong to property as distinct from the person, passes to the trustee in bankruptcy, or where the representee is a company, the liquidator (b). The right of a married woman to sue any person, including her own husband, in an action of deceit, and the conditions subject to which that right may be exercised,

(s) See, as to what are questions of law, and what of fact, in reference to the constituent elements of a representation, Ch. II; the meaning of the representation, Ch. IV, Sect. 4, Sub-s. (4); the necessary constituents of fraud, Ch. V, Sect. 1, and the cases cited in notes (o) and (p) to § 204, *ante*; inducement and materiality, Ch. VI, Sect. 3; alteration of position, Ch. VII, Sect. 2, Sub-s. (3); damage, Ch. VII, Sect. 2, Sub-s. (2), and Sect. 3 of this Chapter; and meaning of representor and representee, Ch. VIII, Sect. 1, Sub-s. (7), and Ch. VIII, Sect. 2, Sub-s. (4), respectively.

(t) See generally Sect. 2 hereof, and the cases cited in the notes thereto.

(u) See the references in the last two notes. A summary statement of the various questions of law, and of fact, respectively in an action for damages for fraudulent misrepresentation is contained in Article 31 of the Code.

(x) See Ch. VIII, *ante*.

(y) See Article 32 of the Code, and, generally, the various treatises on Parties and the R. S. C. As to parties in statutory proceedings, see Ch. XIII, *post*.

(z) See Ch. VIII, Sect. 2, *ante*.

(a) *Twycross v. Grant*, No. 2 (1878), 4 C. P. D. 40, C. A. And see Williams, *Executors and Administrators*. As to the Scotch law in this respect, see App. D, *post*.

(b) As to bankruptcy, see *Hodgson v. Sidney* (1866), L. R. 1 Exch. 313, and *Waddell v. Blockey* (1879), 4 Q. B. D. 678, C. A., and, generally, the treatises on Bankruptcy. As to liquidation of companies, see generally Buckley on Companies.

and the still surviving capacity of the husband to join as a co-plaintiff in any such action against a third person, or in any action in respect of a misrepresentation to his wife causing damage to himself, are matters regulated by the law of husband and wife in relation to torts generally (c). An infant representee may sue by his next friend, according to the practice of the Chancery Division relating to suits by infants (d), and a lunatic representee, or a person of unsound mind not so found by inquisition, may sue by his committee or next friend respectively, according to the like practice (e).

244. The bare right to sue for damages for deceit is not assignable (f). Nor does the transfer of a chattel or other personal property, such as a share in a company, *per se* “vest in the transferee any right of litigation which the transferor might have had in consequence of having been induced to take the shares” [or other property] “by . . . misrepresentation” (g); and such transferee cannot, merely as such, claim the character and status of a representee (h).

245. The procedure adopted, when there are numerous representees suing separately in respect of one and the same misrepresentation, is discussed elsewhere (i).

Sub-sect. (2). Who may be sued.

246. The representor (k), if under no disability, is the only person suable in an action for damages for fraudulent misrepresentation. But where, after the misrepresentation, whether before or after action brought, the representor dies, his estate is liable if, and to the extent to which, it has been augmented by money or property which can be traced and identified as belonging in law or equity to the representee, and which was added thereto by means of the fraudulent misrepresentation, but not further or otherwise (l). The estate of an insolvent representor, whether

(c) See Lush's *Husband and Wife*, and Eversley's *Domestic Relations*.

(d) Ord. 16, rr. 16, 21, and see Simpson's *Infants*.

(e) Ord. 16, rr. 17, 21, and see the various treatises on Lunacy.

(f) *De Hoghton v. Money* (1866), 1 Ch. App. 164, *per* TURNER, L.J., at p. 169: “the right to complain of a fraud is not a marketable commodity,” and the sale of any such right, whether it be a right to recover damages, or to rescind, is illegal, as savouring of champerty or maintenance. See Ch. XI, Sect. 6, Sub-s. (1), *post*.

(g) *Re Bank of Hindustan, China, and Japan, Campbell's and Hippisley's Cases* (1873), L. R. 16 Eq. 417, *per* WICKERS, V.-C., at pp. 431, 432.

(h) See § 183, *ante*, and the cases cited in the notes thereto. The right to rescind, or to recover moneys or property which can be traced and identified, as to which see Ch. XI, Sect. 6, Sub-s. (1), *post*, stands on a different footing altogether.

(i) See Ch. XV, Sect. 2, *post*.

(k) See Ch. VIII, Sect. 1, *ante*.

(l) This is the rule as regards claims for unliquidated damages generally: see *Kirk v. Todd* (1882), 21 C. D. 484, *per* JESSEL, M.R., at p. 488, *Phillips v. Homfray*, No. 2 (1883), 24 C. D. 439, C. A., *per* BOWEN, L.J., at p. 454, and, generally, Williams, *Executors and Administrators*. For instances of the application of the rule to actions for unliquidated damages for deceit, see *Peek v. Gurney* (1873), L. R. 6 H. L. 377 (*per* Lord CHELMSFORD at pp. 392-395); *Twycross v. Grant*, No. 2 (1878), 4 C. P. D. 40, C. A. (where the rule was recognized, though it was not the subject of the decision itself); *Re Duncan, Terry v. Sweeting*, [1899] 1 Ch. 387; *Lagunas Nitrate Co. v.*

a company or an individual, is liable in respect of his or its fraudulent misrepresentations (*m*), in one form or another (*n*). The liability of a married woman to be sued, with or without her husband, in an action of deceit, is co-extensive with her liability to be sued for tort generally (*o*). An infant representor by his guardian *ad litem* may be sued in accordance with the Chancery practice relating to suits against infants (*p*). A representor who is a lunatic, or a person of unsound mind not so found by inquisition, is, by his committee or guardian *ad litem*, as the case may be, suable according to the like practice (*q*). This last rule, of course, presupposes that the lunacy, or unsoundness of mind, supervened after the misrepresentation; for, if the misrepresentation itself was made at a moment when he was not sane enough to know or appreciate its effect, or the nature of the facts which he was representing, it could not have been fraudulent (*r*).

Sub-sect. (3). Incapacity of Shareholder in certain cases to sue Company for Damages.

247. There is one class of case where the relation between the representee and the representor is such that no action for damages is maintainable until that relation is dissolved, viz. where the representor is a company within the meaning of the Companies Acts, now the Companies (Consolidation) Act, 1908, and the representee is a person who claims to have been induced by the misrepresentation to become a shareholder therein. The incapacity in question arises from the peculiar nature of the property which he was induced to acquire, viz. a share in a partnership, as distinct from a chattel, or a piece of land (*s*), and from

Lagunas Syndicate, [1893] 2 Ch. 392, C. A.; and *Davoren v. Wootton*, [1900] 1 Ir. R. 273. It is quite another matter where rescission, or money had and received, is claimed against the estate, the rules as to which are stated in Ch. XI, Sect. 6, Sub-s. (2), *post*; or where fraudulently concealed profits are sought to be recaptured, as in *Lagunas Nitrate Co. v. Lagunas Syndicate*, *sup.*, *quoad* part of the claim, on which part only the plaintiffs succeeded. But, if what is claimed is really in the nature of damages, a representee cannot establish a right to go against the estate, merely by putting a definite and precise figure upon the amount (like the famous claim for "moral and intellectual damages" arising out of the Jamieson Raid, which ended in 3½*d.*), or merely by labelling his cause of action "money had and received": this was one of the points decided in *Re Duncan, Terry v. Sweeting*, *sup.*, *per* ROMER, J., at p. 392.

(*m*) See the various treatises on Bankruptcy and Companies (Winding Up), respectively.

(*n*) As to when the claim may be proved for, and when it must form the subject of an action, see Sect. 3, *sup.*

(*o*) As to which see Lush's *Husband and Wife*, and Eversley's *Domestic Relations*. As applied to an action of deceit, see *Cuenod v. Leslie*, [1909] 1 K. B. 880, C. A.

(*p*) See R. S. C., Ord. 16, rr. 16, 18, 19, 21, and Simpson's *Infants*.

(*q*) See R. S. C., Ord. 16, rr. 17-21, and the various treatises on Lunacy.

(*r*) Similarly, in respect of defamation, at p. 356 of *Emmens v. Pottles* (1885) 16 Q. B. D. 354, C. A., Lord ESHER, M.R., observes, in reference to an argument that a lunatic might be liable for libel or slander, "that depends on whether he is sane enough to know what he is doing."

(*s*) *Houldsworth v. City of Glasgow Bank* (1880), 5 App. Cas. 317, H. L., *per* Lord CAIRNS, L.C., at pp. 323-326, where his reasoning applies equally to all forms of partnership. Cp. *Re Hull and County Bank, Burgess's Case* (1880), 15 C. D. 507, 511-514.

the special relationship to one another of himself and the other shareholders (*t*). On the one hand, the mere fact that the representor is a corporation makes no difference to its liability to a stranger (*u*), or to the right of a shareholder to sue in respect of any fraudulent misrepresentation other than one of the character under discussion, he being, for that purpose, regarded as a stranger (*x*); on the other hand, any shareholder may sue the corporation for rescission and restitution, and so sever his connection with it (*y*). But, unless and until he does so, he cannot sue the body of which he is a member for damages in respect of a representation by which he was induced to become a member (*z*), because this would be to approbate and reprobate at one and the same time (*a*), and an attempt "to reconcile two inconsistent positions, viz. that of shareholder and that of creditor of the whole body of shareholders, including himself" (*b*), and because damages, in such a case, are "neither more nor less than the whole aliquot share due from him in contribution of the whole debts and liabilities of the company. . . . But it is of the essence of the contract between the shareholders (*as long as it remains unrescinded*) that they should all contribute equally to the payment of all the company's debts and liabilities. He is either suing all shareholders except himself, who are as innocent as himself, or, if they are fraudulent, he is as fraudulent as they" (*c*).

(*t*) See notes (*z*), (*a*), (*b*), and (*c*), *inf*.

(*u*) See Ch. VIII, Sect. 1, Sub-s. (4), *ante*.

(*x*) See note (*a*), *inf*.

(*y*) *Western Bank of Scotland v. Addie* (1867), L. R. 1 H. L., (Sc.) 145, *per* Lord CHELMSFORD, L.C., at pp. 163, 164.

(*z*) *Houldsworth v. City of Glasgow Bank, sup.*, *per* Lord CAIRNS, L.C.

(*a*) *Ibid.*, *per* Lord SELBORNE at p. 329: "for many purposes a corporator with whom his own corporation has dealings, or on whom it may by its agents inflict some wrong, is in the same position towards it as a stranger . . . but here it is impossible to separate the nature of the pursuer's claim from his status as a shareholder, unless the status can be put an end to by rescinding the contract which brought him into it."

(*b*) *Ibid.*, *per* Lord HATHERLEY at p. 333.

(*c*) *Ibid.*, *per* Lord SELBORNE at pp. 329, 330. Cp. Lord HATHERLEY at pp. 332-335, and Lord BLACKBURN at pp. 338-341.

CHAPTER XI.

RESCISSION AND CONSEQUENTIAL OR ANALOGOUS RELIEF.

248. In every department of the law, where the nature of the case admits of it, a party who has suffered an *injuria* may be righted either indirectly or directly. Thus, in cases of injunction, the order may assume a negative or prohibitory form, or a mandatory and positive one ; and, where a contract is sought to be enforced, the object may be indirectly attained by pecuniary compensation, or (in a proper case) directly by specific performance. The same alternative remedies are available, where the aid of the court is invoked to get rid of a contract, or its consequences, on any grounds recognized by law ; and misrepresentation is one of those grounds. That is to say, the relief may be indirect in the shape of an award of a lump sum as damages, or direct, in the form of judicial annulment of the contract, and mutual restitution *in specie*. In the one case, the past is accepted and recognized, but compensated for by an equivalent in money ; in the other, the past is undone, and the *status quo* is restored *ad integrum*. The former of these alternative modes of relief has been dealt with in the preceding Chapter ; it is now proposed to discuss the latter.

SECT. 1. NATURE AND LIMITS OF THE RIGHT TO AVOID A CONTRACT
INDUCED BY MISREPRESENTATION.*Sub-sect. (1). General Statement.*

249. Where the representee's alteration of position consisted in the making of a contract, or the entering into a transaction (*a*), with the representor, which was induced by a misrepresentation, being a material one, on the part of such representor, the representee may, on discovery of the truth, repudiate the contract or transaction, and if, on being notified of such repudiation, the representor refuses to concur, may institute proceedings for the judicial annulment thereof, with all necessary and appropriate consequential relief (*b*) ; and, on establishing the several matters as to which the burden of allegation and proof rests upon him (*c*), unless the representor

(*a*) As to what "transaction" means, see Ch. VII, Sect. 1, Sub-s. (2), *ante*. A gift is the most familiar illustration, see *Re Glubb, Bamfield v. Rogers*, [1900] 1 Ch. 354, *per* LINDLEY, M.R., at pp. 361, 362.

(*b*) See Sect. 3, *post*.

(*c*) See Sect. 2, *post*.

can establish any of the countervailing pleas hereafter mentioned (*d*), the representee will be entitled to succeed in such proceedings.

Sub-sect. (2). For Purposes of Rescission, Fraud and Innocence Immaterial.

250. It is now well established that for purposes of rescission the question, which is of such vital importance in actions for damages (*e*), whether the misrepresentation was fraudulent or innocent (*f*), is wholly immaterial (*g*). It is true that, in the year 1867, the Court of Queen's Bench resolved that, *at common law*, no contract could be rescinded on the ground that it was procured by a merely innocent, though material, misstatement, unless such misstatement went "to the root of" the contract (*h*), but it was not suggested that this limitation even at that date, which was prior to the Judicature Acts, was, or had ever been, accepted in equity; and now that every court is a court of equity, so far as the principles of the law are concerned, the limitation is not recognized anywhere (*i*). Of course the misrepresentation must be shown to have been material (*k*), but not necessarily to have related to the very substance and essence of the subject-matter of the contract.

251. The irrelevancy of the above question in proceedings for the avoidance of a contract is illustrated and enforced in a very practical fashion by the consequences with which the courts have visited those representees who, in such proceedings, have failed to prove a case of

(*d*) See Sect. 4, *post*.

(*e*) See § 204 in Ch. X, Sect. 1, *ante*.

(*f*) For the meaning in law of "fraudulent" and "innocent" respectively, see Ch. V, *ante*.

(*g*) *Re Deposit and General Life Assurance Co., Ex parte Ayre* (1858), 27 L. J. (CH.) 579, *per* ROMILLY, M.R., at p. 583; *Ross v. Estates Investment Co.* (1868), 3 Ch. App. 682, *per* Lord CAIRNS, L.C., at p. 685, describing the representations in that case as "made either fraudulently, or in such a way as entitled the plaintiff, when he discovered their inaccuracy, to repudiate his shares"; *Redgrave v. Hurd* (1881), 20 C. D. 1, C. A., *per* JESSEL, M.R., at pp. 12, 13; *Re Denham & Co., Ltd.* (1883), 25 C. D. 752, *per* CHITTY, J., at pp. 766, 767; *Derry v. Peek* (1889), 14 App. Cas. 337, H. L., *per* Lord HERSCHELL at p. 359; *Re Metropolitan Coal Consumers' Association, Wainwright's case* (1890), 63 L. T. 429, C. A., *per* COTTON, L.J., at p. 431 ("this case is not like an action of deceit. . . . A man who has been induced to enter into a contract by material misrepresentation is entitled to be relieved from it, even if the representations are made innocently"); *Stewart v. Kennedy* (1890), 15 App. Cas. 108, *per* Lord WATSON at pp. 121, 122; and *Ferguson v. Wilson* (1904), 6 F. 779, 783. Fraud, however, becomes of great importance when it is a question of resisting certain affirmative defences which otherwise would be entitled to succeed, such as those dealt with in Sect. 4, Sub-ss. (2) and (3), *post*, *q.v.*, and also in cases where the contract has been completely executed on both sides, and where, if there was fraud, rescission may, notwithstanding, be ordered. See Sub-s. (4) of the present Section, *post*.

(*h*) *Kennedy v. Panama, New Zealand, and Australian Royal Mail Co.* (1867) L. R. 2 Q. B. 580, 587.

(*i*) See the cases cited in the notes to Sect. 3, *post*, generally, in some of which the misrepresentation was either admittedly innocent, or not alleged or declared to be fraudulent. No doubt, it so happens that *in fact* fraud existed in the large majority of these cases, as one would expect, since misstatements which form the subject of litigation are far more often lies than mistakes: but this was, for the purposes of the decisions, a mere accident.

(*k*) See Ch. VI, Sect. 2, *ante*, and the observations of COTTON, L.J., cited in note (*g*), *sup*.

fraud which may have been unnecessarily, and therefore improperly, set up, though succeeding in establishing everything necessary for the purpose of the relief claimed. There was, indeed, a time when it was thought that a bill containing such averments constituted a sort of undertaking to prove them, though not required for the purposes of making good a title to relief, and that if the party failed to satisfy that implied undertaking, his whole bill was liable to be dismissed (*l*), or at least so much of it, if the allegations could be severed, as charged fraud, without prejudice to a decree in his favour in respect of the residue (*m*). But this rigorous, and very unjust, practice has long since been abandoned (*n*); and the milder, but sufficiently penal, rule now prevails that he who unnecessarily sets up fraud, though entitled to judgment on proving the misrepresentation, must pay the representor all the costs incurred by him in resisting the charge, and bear his own costs of making it (*o*). Where, however, the representee's case, as pleaded, is based on the fraud, in the sense that if the averments relating to it be struck out of the declaration or statement of claim, no intelligible cause of action remains, it is still the rule that, on failing to prove the fraud, he ought not to be allowed to fall back on some other cause of action, such as

(*l*) Lord COTTENHAM, L.C., was reported to have said something very like this at pp. 620, 621, and 625 of *Wilde v. Gibson* (1848), 1 H. L. C. 605 (with which compare the observations of Lord BROUGHAM at p. 628). But his observations were confined to the very special circumstances of that case, in which the plaintiff, charging personal fraud, and failing to prove it, was held not entitled to rely on another kind of fraud (*sc. constructive*). At any rate, in the following year he retracted and modified this proposition, in so far as any inference to the effect stated in the text could be drawn from it—see the case cited in the next note, and the explanation of these views and dicta given by TURNER, V.-C., at pp. 264, 265 of *Espey v. Lake* (1852), 10 Hare, 260, PAGE-WOOD, V.-C., at pp. 673, 674, of *Parr v. Jewell* (1855), 1 Kay & J. 671, and Lord CHELMSFORD, L.C., at p. 331 of *Hickson v. Lombard* (1866), L. R. 1 H. L. 324.

(*m*) This was the modified view expressed by Lord COTTENHAM, L.C., at pp. 459, 460 of *Archbold v. Commissioners of Charitable Bequests in Ireland* (1849), 2 H. L. C. 440 ("if fraud be imputed, and other matters alleged which would give the court jurisdiction as the foundation of a decree, then the proper course is to dismiss so much of the bill as is not proved, and to give so much relief as under the circumstances the plaintiff is entitled to"), and by PAGE-WOOD, V.-C., in *Parr v. Jewell*, *sup.*

(*n*) KNIGHT-BRUCE, L.J., at p. 750 of *Small v. Currie* (1854), 23 L. J. (CH.) 746, emphatically dissented from the supposed doctrine: "surely no one ventures to suggest that, if a plaintiff makes a case founded on fraud, and an alternative case not founded on fraud, his bill must be dismissed because he fails to prove fraud." In *Anderson v. Thornton* (1853), 8 Exch. 425, a marine insurance case, where the defendant had unnecessarily alleged fraud as a defence, which the jury expressly negatived, the plea nevertheless prevailed, because there was enough left in it to constitute a good answer: *per* PARKE, B., at p. 428. In *Swinfen v. Lord Chelmsford* (1860), 5 H. & N. 890, the rule was expressed in still more general terms, *per Cur.*, at pp. 920, 921: "we are of opinion that, if a declaration discloses a state of facts upon which an action may be maintained, although there be neither malice nor fraud, the plaintiff is not bound to prove either, *though both be alleged*, and may recover upon the liability which the facts disclose, *though fraud and malice be disproved*." And see the next note.

(*o*) *London Chartered Bank of Australia v. Lempriere* (1873), L. R. 4 P. C. 572, at p. 597: "if the case is based on the fraud, the failure to prove it must be, like the failure to prove any other essential ingredient, fatal. But if, striking out the charges of fraud, there is sufficient equity stated and proved—if, as in this case, the fraud is thrown in by way of subsidiary answer to the counter-case of the defendants, it is a matter affecting only costs."

negligence, which is independent of the question of good or bad faith (*p*), or, in an appellate court, rely upon evidence given by the representor in the court below which might establish such cause of action, the reason being that if the claim had been so framed in the first instance, the representor's evidence might have been of a very different character to that which was adduced on the supposition that fraud, and fraud only, was what he had to rebut (*q*).

Sub-sect. (3). Immateriality of Question whether the Contract was Detrimental or Beneficial to the Representee.

252. Damage, which is as vital as fraud to other forms of action for misrepresentation, is as irrelevant as fraud to any proceedings for rescission. The relative advantages or disadvantages of adhering to, or of repudiating, a contract induced by an incorrect statement are matters for the consideration of the representee. He is to be the sole judge of the expediency or propriety of getting rid of the relations between himself and the representor. It is no answer to his claim, if otherwise good, to point to the most irrefragable evidence that the contract, if abided by, will work out to his benefit, and not to that of the representor, or will be to the common advantage of both, and that any person of ordinary business sagacity would recognize that, though misled, the representee has been misled into a lucrative, and not a detrimental, alteration of position. The rationality of his motives for insisting on avoidance is wholly immaterial. To the representor's question,—“why should you capriciously and wantonly abandon a business which is demonstrably for your advantage?”—he is entitled to reply, with Shylock, “it is my humour.” It may be a matter of honour, and not of interest, with him. Having seen cause to regret his association with an undesirable individual, company, or enterprise, and finding subsequently that the law gives him a right to sever the association, he may be anxious to avail himself of that right, irrespective of any immediate or tangible gain or loss (*r*). The sole relevant question is as to the right to rescind; if the right does not exist, *cadit quæstio*; if it does, the law no more concerns itself with the reasons which move the representee to exercise his right, than it concerns itself with the motives which influence a party to insist on any other

(*p*) *Thom v. Bigland* (1853), 8 Exch. 725, 730–732, where, unlike *Anderson v. Thornton, sup.*, (distinguished on this ground), the allegations could not be separated, and, if fraud were eliminated, nothing was left, and where, the plaintiff having failed to prove fraud, the verdict for the defendant stood; *London Chartered Bank of Australia v. Lempriere, ubi sup.*; and *Connecticut Fire Insurance Co. v. Kavanagh*, [1892] A. C. 473, at p. 479, where a party had framed his declaration on fraud in such a way that, if this charge were deleted, what remained would be unintelligible and unactionable, and it was held that he ought not to be allowed to raise a new case of negligence.

(*q*) *Hickson v. Lombard* (1866), L. R. 1 H. L. 324, *per* Lord CRANWORTH at p. 336; and *Connecticut Fire Insurance Co. v. Kavanagh, sup.*, at p. 480.

(*r*) See the cases cited at the end of note (*l*) to § 341, *post*, and *cp. Flight v. Booth* (1834), 1 Bing. (N. C.) 370, at pp. 378, 379, as to the irrelevance of value and compensation in such cases.

right of property, or action, to which he may be entitled (s). The representor has no voice in the matter, and he can neither be heard to speculate, nor invite the court to speculate, on the supposed inadequacy or insagacity of such reasons or motives.

Sub-sect. (4). Contracts induced by Misrepresentation voidable, not void, with certain exceptions. Representee's Option or Right of Election.

253. It is now well established that, except where the misrepresentation relates to the nature and substance of the contract itself, or the identity of the alleged contractee (t), any contract procured by misrepresentation is valid unless and until disaffirmed, and is not invalid *ab initio*, or, like certain contracts with infants before the passing of the Infants Relief Act, 1874, invalid unless and until confirmed; in other words, with the above exceptions, such contracts are not void, but voidable (u). It may be doubted whether, in the earlier stages of our jurisprudence, the enormous importance of the distinction between voidability and *ipso facto* invalidity was fully appreciated, or, assuming it to have been so, was adequately

(s) So in non-disclosure cases "it is not necessary to show that . . . that loss afterwards took place in consequence of these transactions": *per* Lord LANGDALE, M.R., at p. 84 of *Gillett v. Peppercorne* (1840), 3 Beav. 78. And, in cases of contract generally, the party who has contracted for one thing is not bound to accept another, and a different, thing, though most people might think it more valuable, and though it may have involved greater expense to the other party: *Forman & Co. Proprietary, Ltd. v. SS. Lidderdale*, [1900] A. C. 190, 197, 201, P. C.

(t) See §§ 256, 257, 258, 259, *inf.*

(u) Out of a number of cases where the proposition is stated, the following only in which the question became of importance, need be cited: *Stevenson v. Newnham* (1853), 13 C. B. 285, Exch. Ch., *per Cur.*, at pp. 302, 303 ("the effect of this, as of ordinary frauds, is not absolutely to avoid the contract or transfer which has been caused by that fraud, but to render it voidable at the option of the party defrauded. . . . It must be considered, therefore, as established, that fraud only gives a right to rescind the contract or purchase; that the property vests until avoided; and that all mesne dispositions to persons not party to, or at least not cognizant of, the fraud are valid"); *Feret v. Hill* (1854), 15 C. B. 207, 223-227; *Ogilvie v. Currie* (1868), 37 L. J. (CH.) 541, *per* Lord CAIRNS, L.C., at p. 546; *Reese River Silver Mining Co. v. Smith* (1869), L. R. 4 H. L. 64, *per* Lord HATHERLEY, L.C., at pp. 73, 74; *Clough v. London and North Western Railway Co.* (1871), L. R. 7 Exch. 26, Exch. Ch., *per Cur.* at p. 34 ("the fact that the contract was induced by fraud did not render the contract void, or prevent the property from passing, but merely gave the party defrauded a right, on discovering the fraud, to elect whether he would continue to treat the contract as binding, or would disaffirm the contract, and resume his property, . . . and we further agree that the contract continued valid until the party defrauded had determined his election by avoiding it"); *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218, *per* Lord BLACKBURN at pp. 1277, 1278; *Re Scottish Petroleum Co., Wallace's case* (1883), 23 C. D. 413, C. A., *per* BAGGALLEY, L.J., at pp. 430-432; *Aaron's Reefs, Ltd. v. Twiss*, [1896] A. C. 273, H. L., *per* Lord WATSON at pp. 290, 291, and Lord DAVEY at p. 294; *Re Glubb*, [1900] 1 Ch. 354, C. A., *per* LINDLEY, M.R., at pp. 361, 362, as to a gift; and *United Shoe Machinery Co. of Canada v. Brunet*, [1909] A. C. 330, P. C., at p. 339 ("a contract into which a person may have been induced to enter by false and fraudulent representation is not void, but merely voidable at the election of the party defrauded, after he has notice of the fraud. Unless and until he makes his election, and by word or act repudiates the contract . . . the contract remains as valid and binding as if it had not been tainted with fraud at all"). See also several of the cases cited in the notes to Sect. 4, Sub-ss. (5) and (6), of this Chapter, *post*.

expressed (*x*). But, at the present day, there is no question either as to the mutually exclusive character of these two legal incidents or qualities, or as to the serious practical bearing of the proposition above stated on the interests and rights both of the representee (*y*), and of the representor (*z*), in any proceedings for rescission.

254. It follows from the above that, in the first instance, the representee's only right is one of election, whether to affirm or disaffirm the contract (*a*). He has no right, at any subsequent moment most convenient to himself and most inconvenient to the representor, without having said or done anything in the interim declaratory of his intentions or attitude in the matter, to insist that the contract was a nullity from the beginning. Still less, on the other hand, can any representor, who may find that the contract which he has brought about by misrepresentation is turning out to the representee's benefit and not to his own, take advantage of his own wrong, and claim that by reason of that wrong it never had any efficacy at all,—which course, if it had been void *ab initio*, he clearly could adopt. This latter consideration, indeed, furnishes the most forcible illustration possible of the absurdities and injustice which would result from holding that any such contract is void, or is defeasible at the option of either party, instead of being, as it clearly is, defeasible at the option of the

(*x*) Thus Lord ELLENBOROUGH, C.J., in *Duffel v. Wilson* (1808) 1 Campb. 401, seems to have regarded a contract induced by misrepresentation as void, unless, as seems probable—see the observation of Sir GORELL BARNES at p. 548 of *Kettlewell v. Refuge Assurance Co.*, [1908] 1 K. B. 545, C. A.—he here meant by this term “voidable.” He could not, however, have so meant, and the same explanation is not possible, in *Hill v. Gray* (1816), 1 Stark. 434 (a hopelessly bad decision). In *Noble v. Adams* (1816), 7 Taunt. 59, the same error is distinctly traceable; and the verbal slip again appears twice in the otherwise admirable judgment of the C. P. delivered by TINDAL, C.J., in *Flight v. Booth* (1834), 1 Bing. (N. C.) 370 (at pp. 376 and 377). Even at a much later date, no less an authority than Lord CRANWORTH, in giving a bad reason for a sound conclusion, uses language which is at least consistent with the heresy in question: see his observations at p. 123 of *Central Railway Co. of Venezuela v. Kisch* (1867), L. R. 2 H. L. 99 (“if the prospectus stated what was untrue, he is entitled to treat all which he did in reliance on its being true as absolutely null and void”—which is just what he is *not* entitled to do). When judges use such dubious language, business men can scarcely be blamed for not discriminating between “void” or “voidable,” or for using the former term, when they mean the latter, as is habitually done in policies of life insurance, a common condition of which is that in the event of misrepresentation or non-disclosure the policy shall be “void.” In *Armstrong v. Turguand* (1857), 9 Ir. C. L. R. 32, where a condition of this kind was in question, the court—conscious of the law's own misapplication of this term in the past—had no difficulty in construing it as meaning “deemed to have been void,” or “void, if the company elect to treat it as such,” or “voidable,” and, on this construction, held that, by receipt of premiums and otherwise, the company had clearly elected to affirm that which, if they had pleased, they might have elected to avoid—a conclusion which could not have been arrived at if, as of course the company contended, the contract had been in law avoided once for all, and *ipso facto*, by the misrepresentation.

(*y*) For, except in certain classes of case, no representee can invoke the aid of the Court to judicially annul what is already void in law: see Sect. 2, *inf*.

(*z*) If the contract were void *ab initio*, all the affirmative defences and answers based on the representee's conduct or inaction subsequent to his discovery of the truth, would not—as they undoubtedly are—be available to the representor: as to these defences and answers, see Sect. 4, Sub-ss. (4), (5), (6), and (7), of this Chapter, and Ch. XII, Sects. 2, 3, *post*.

(*a*) Com. Dig. Election, C. 2, and *Clough v. L. & N. W. Railway Co.* (1871), L. R. 7 Exch. 26, 34 Exch. Ch., *ubi sup*.

representee only. This means that, having discovered that he was induced to contract by a false representation, the representee may choose between three courses: (1) if the contract appears to him to be working out to his advantage, or whether it so appears or not, and from whatever motive, he may do nothing, and the representee cannot compel him to do anything with a view to its avoidance; (2) he may repudiate it; or (3) he may, if it has resulted in loss, and the representation was fraudulent, be content to adhere to it, and take a lump cash sum presently payable as an equivalent for such loss. And, even after failing in a claim for rescission, he may still, if he is in a position to satisfy the necessary conditions precedent, maintain an action for damages against the actual representor (b).

255. The representee is not bound to make any election at all, or he may postpone the exercise of his right for any period he pleases, though such omission or delay exposes him to serious risks of a nature to be explained hereafter (c). But the right, when exercised, is exhausted. *Quod in electionibus semel placuit, amplius displicere non potest.* The election, once determined, is determined for ever (d). He may keep the sword of Damocles suspended over the contract as long as he pleases; but if he takes it from its place, he can never put it back again; and if, on the other hand, he cuts the thread and lets the sword fall, whether he destroys the contract or not, he loses the sword. If he once affirms he can never afterwards avoid (e); and, if he once avoids, he can never afterwards either affirm in his own interests (f), or be deemed to have affirmed in the interests of the representor (g). There is no *locus pœnitentiæ* in either case.

256. There is one (apparent, rather than real) exception to the rules above stated, viz. when the representee, on the faith of the misrepresentation, does something which has the outward semblance, but not the inward reality, of a contract, or of such a contract as is alleged. Such contracts are not voidable: they are usually termed void, though, as has been observed in a recent case by BUCKLEY, L.J. (h), the more correct description of the situation would be to say that there never was any contract at all (i), and, this being so, the class of case under discussion constitutes

(b) Thus, the representee who, in *Clarke v. Dickson*, No. 1 (1858), E. B. & E. 148, failed to obtain relief by way of rescission against (the cost-book mining company succeeded, in *Clarke v. Dickson*, No. 2 (1859), 6 C. B. (N. S.) 463, in recovering damages against the directors who made the representation, which was shown to be fraudulent.

(c) *Vide* Sect. 4, Sub-s. (7), *inf.*

(d) *Clough v. L. & N. W. Railway Co.*, *sup.*, at p. 34.

(e) *Ibid.*, at p. 36.

(f) *Ibid.* at the same page.

(g) *Re Thomas Edward Brinsmead & Sons, Tomline's case*, [1908] 1 Ch. 104, where the rule operated to the detriment of the representor, who set up conduct of the representee amounting to affirmation of the contract, and for the benefit of the representee, who was in a position to point to a definite exercise of his election to avoid prior to the acts and conduct in question which otherwise would have clearly barred his title to relief, WRIGHT, J., holding (at p. 109) that "election once made is made for ever, and cannot be revoked even if the party wishes."

(h) At p. 481 of *Whitehorn Bros. v. Davison*, [1911] 1 K. B. 463, C. A.

(i) This is indicated by the form of the plea, in such cases, of *non est factum*. The term "void" should in strictness be reserved for those transactions which are, so

no exception whatsoever to the general proposition that a contract induced by misrepresentation is voidable only, because *ex hypothesi* no contract ever came into being.

257. The first species of the class in question consists of those cases in which the representor misstates the nature, quality, character, description, class, or (in any of the above senses) "contents," of any instrument which, by such misrepresentation, he induces the representee to execute. In such cases a plea of *non est factum* is a good answer to any action based upon the instrument, "on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and, therefore, in contemplation of law, never did sign, the contract to which his name is appended" (*k*). The essence of every contract is mutual consent, and though this mutual consent must be expressed by some act, and, in certain cases, by some ceremony or form of a particular specified kind, yet these "trappings and suits" are of no importance whatsoever, unless there is "that within" which alone gives them reality and life. Where there exists the intention, unclothed by the usual formalities, equity will, unless forbidden by statute, disregard the latter; but where the mere external act is not the reflection or the expression of the party's intention, neither law nor equity will attribute any efficacy to it. No signature, seal, or ceremony, of whatever solemnity (*l*), will make that to be a contract which was never intended to be so. "The true way of ascertaining whether a deed is a man's deed is, I conceive," says BUCKLEY, L.J., in a very lucid exposition of the theory (*m*), "to see whether he attached the signature with the intention that that which preceded his signature should be taken to be his act and deed. It is not necessarily essential that he should know what the document contains; he may have been content to make it his act and deed, whatever it contained. . . . If, on the other hand, he is materially misled as to the contents of the document, then his mind does not go with his pen. In that case it is not his deed." Accordingly, where the representor misreads to the representee a release of property as a mere acquittance for arrears of rent (*n*), or mistates a bill of exchange to be a guarantee (*o*), or a mortgage deed to be a deed on behalf of a purchaser at a sale (*p*), or to be a mere paper to facilitate the raising of money in the remote future (*q*), or a guarantee to be an insurance paper (*r*), the document executed by the representee is not his contract

far as the intention of the parties is concerned, actual contracts, but which either the legislature, or public policy, pronounces to be illegal, or unenforceable, as to which see Sect. 2, *inf.*

(*k*) *Foster v. Mackinnon* (1869), L. R. 4 C. P. 704, *per* BYLES, J., at p. 711.

(*l*) Even marriage: see § 266 in Sect. 2, *post*.

(*m*) In *Carlisle and Cumberland Banking Co. v. Bragg* [1911] 1 K. B. 489, C. A. at pp. 495, 496.

(*n*) *Thoroughgood v. Cole* (1582), 2 Coke Rep. 9A.

(*o*) *Foster v. Mackinnon*, *sup.*

(*p*) *Vorley v. Cooke* (1857), 1 Giff. 230, *per* STUART, V.-C., at p. 286.

(*q*) *Bagot v. Chapman*, [1907] 2 Ch. 222.

(*r*) *Carlisle and Cumberland Banking Co. v. Bragg*, *sup.* In *Willis v. Barron*, [1902] A. C. 271, H. L., Lord Halsbury L. C., at p. 273, said that any jury would

at all, and no question arises of voidability, or subsequent election to affirm or disaffirm; though there are cases in which the court has not declined jurisdiction to set aside instruments which would appear to have been clearly void, or rather to have constituted no contract at all, such as an assignment of a mortgage misrepresented to be a document for the mere purpose of insuring punctual payment of interest (*s*), a deed of sale falsely described as a mortgage (*t*), or a new mortgage pretended to be a mere renewal of a previous one (*u*). It has been occasionally contended that negligence in executing an instrument under such circumstances would prevent its being void, but (as will be seen) this is quite a mistake (*x*). Recently, also, some doubt has been expressed whether the doctrine has been, or, if it has, ought any longer to be, applied for the benefit or relief of any but an illiterate or blind person (*y*), but there does not seem any ground, either in principle (*z*), or on authority (*a*), for such a limitation.

258. On the other hand, where the misrepresentation relates only to the legal effect, purpose, or object, or to the contents (in the sense of the particular terms and provisions), of the instrument, the contract contained in, or recorded by, such instrument is not void, but voidable only, because in that case the representee does intend to enter into *some* contract of the nature described, whereas, in the other type of case, he has no such intention. The distinction between the consequences following the two classes of misrepresentation has been laid down in very clear terms by the Court of Exchequer: "whatever shows that the bond never was the deed of the defendant may be given in evidence upon *non est factum*. But, if the party actually executed it, and was competent at the time to execute it, and was not deceived as to the actual contents of the bond, though he might be deceived as to its legal effect, and though he might

have been justified in finding *non est factum*, in a case of undue influence, where one of the acts complained of was the procuring of the execution of a deed materially affecting the party's rights by a misdescription of it as a document required for the mere formal purpose of rectifying a mistake.

(*s*) *Kennedy v. Green* (1834), 3 My. & K. 699, where, at p. 718, Lord BROUGHAM L.C., holds, in express terms, that the facts would have supported a plea of *non est factum*.

(*t*) *Lewellin v. Cobbold* (1853), 1 Sm. & G. 376. Cp. *Vorley v. Cooke*, *sup.*, where the defendant, though succeeding in his defence, obtained also rescission by cross-bill.

(*u*) *Lee v. Angas* (1866), 7 Ch. App. 79 n.

(*x*) See this question discussed in Ch. XII, Sect. 3, *post*.

(*y*) By FARWELL, L.J., with whom COZENS-HARDY, M.R., in a postscript to his judgment expresses his agreement, at p. 4 of *Howatson v. Webb*, [1908] 1 Ch. 1, C. A. In *Anon.* (1684), Skin. 159, the distinction was certainly drawn ("being able to read, it was his own folly; otherwise if he had been unlettered"). But this decision was given in times when courts thought it their duty to punish an honest man for his stupidity, as much as a rogue for his knavery.

(*z*) See the observations of BUCKLEY, L.J., at p. 496 of *Carlisle and Cumberland Banking Co. v. Bragg*, *sup.*: "I do not think myself that cases of this kind are to be confined to the blind and illiterate. . . . It seems to me that the same doctrine applies to every person who is so placed as that he is incapable by the use of such means as are open to him of ascertaining, or is by false information deceived in a material respect as to, the contents of the document which he is asked to sign."

(*a*) In none of the cases cited above was the representee either illiterate or blind, except in *Thoroughgood v. Cole*, *sup.*, where "goodman Thoroughgood" is described as "a layman, not lettered."

have been entitled to avoid the bond by stating that he was so misled, it nevertheless became, by his execution, the deed of the defendant, and he is not at liberty, upon the plea of *non est factum*, to say that it was not" (b). Forty years later, MELLISH, L.J., in connection with dispositions of real property, expresses the same view in somewhat different language: "where a man knows that he is conveying, or doing something with, his estate, but does not ask what is the precise effect of the deed, because he is told that it is a mere form . . . then, in my opinion, a deed so executed, though it may be voidable on the ground of fraud, is not a void deed" (c). On this principle, the plea of *non est factum*, or the equivalent, but not so correctly expressed, plea of voidness, failed both in the cases already cited and also in others which followed them (d).

259. The other species of the class of misrepresentation in question

(b) *Edwards v. Brown, Harries, and Stephens* (1831), 1 Cr. & J. 307, at p. 312.

(c) *Hunter v. Walters* (1871), 7 Ch. App. 75, at p. 88. In this case it was held that a mortgage deed, misdescribed as merely a matter of form for the purpose of transferring the interest of the mortgagor to the defendant, was not void, and therefore that the rights of a prior equitable mortgagee without notice were not defeated: see also the observations of Lord HATHERLEY, L.C., at pp. 81, 82, and JAMES, L.J., at pp. 84, 85.

(d) See *National Provincial Bank of England v. Jackson* (1886), 33 C. D. 1, C. A., where two ladies had executed certain deeds on the faith of the misrepresentation of their brother, a solicitor, that they were required for the mere purpose of completing a previous transaction. Still they "knew that the deeds dealt in some way with their houses," and, therefore, their defence against the claim of mortgagees without notice was held bad, COTTON, L.J., at p. 10, observing: "now the rule of law is that if a person who seals and delivers a deed is misled by the misstatement or misrepresentation of the person procuring the execution of the deed, so that he does not know *what* is the instrument to which he puts his hand, the deed is not his deed at all, because he was neither minded nor intended to sign a document of *that character or class*, as, for instance, a release, intending to execute a lease. Such a deed is void. But I cannot come to that conclusion here. . . . On the evidence it is clear that nothing was said to mislead them as to the *nature* of the deed they were executing"; and cp. the observations of LINDLEY, L.J., at p. 13, and LOPES, L.J., at p. 14. To the same effect, CHITTY, J., at pp. 196, 197 of *Lloyds Bank v. Bullock*, [1896] 2 Ch. 192. So in *Howatson v. Webb*, [1907] 1 Ch. 537, the same proposition is clearly stated, and applied, by WARRINGTON, J., in a most instructive judgment, reviewing and reconciling the previous authorities. This judgment was affirmed on appeal, [1908] 1 Ch. 1, C. A., COZENS-HARDY, M.R., at p. 3, saying of it, in a very brief deliverance, "I accept and approve every word of his judgment," and FARWELL, L.J., citing a passage from it as a complete and correct expression of the law. In that case, the defendant, at the request of a solicitor to whom he had recently been managing clerk, executed rapidly, and without looking at them, a series of deeds, which he knew related to property which he was holding as nominee for the solicitor, in the belief, induced by the solicitor's falsehood, that all of them were mere transfers from him to a person who was to succeed him as such nominee. One of these was, in fact, a mortgage, in which he was recited to have borrowed £1000 of the mortgagee, who sued him on the personal covenant to repay. It was held that he had no defence, and that his plea of *non est factum* was not made out, there having been no misrepresentation of the *nature, character, or class* of the inducement, but only of its contents, effect, or purpose. WARRINGTON, J., with reference to the use of the expression "contents" or "actual contents" in some of the cases in which it was said that a misstatement thereof is such as to render an instrument void which was executed on the faith of such misstatement—see some of the extracts from judgments already cited—takes occasion to point out that in all those cases, as appears from the context, the term is used to signify the nature or character of the document, and not its particular provisions, or its effect or purpose. Cp. *Lloyd v. Grace, Smith & Co.*, [1911] 2 K. B. 489, C. A., per VAUGHAN WILLIAMS, L.J., at pp. 500, 501, agreeing with the other members of the court in this respect, though differing in other points.

is a misstatement of the identity of the person with whom the representee is led to believe that he is contracting. Here there is essential *error personæ*, as, in the other type of case, there is essential error as to the transaction. In the one case, as in the other, there is no contract at all. If A, expressly or by acts and conduct, personates B., and thereby induces the representee to contract with, or deliver goods to, A., in the belief that he is B., there never comes into being any contract between the representee and A., because he never intended to deal with A., and, therefore, in contemplation of law, never did so deal, and no property or title of any sort is deemed to have passed to A., and no question can arise either of avoiding on the one hand, or of affirming on the other, a pretended contract which never had any real existence. In all such cases, where the fraud, in a criminal aspect, would have amounted to larceny by a trick, the representee has succeeded as against innocent third parties, which, of course, he could not have done on the hypothesis of mere voidability (*e*). On the other hand, where the fraudulent misrepresentation would in a criminal court be deemed to amount to no more than a false pretence, there being a real intention to contract, and therefore a real contract, though brought about by the misrepresentation, such contract is voidable only (*f*).

SECT. 2. WHAT MUST BE ALLEGED AND PROVED BY THE REPRESENTEE IN PROCEEDINGS FOR RESCISSION.

260. In any proceedings instituted for the purpose of obtaining rescission, the onus is on the representee of alleging, and (unless expressly or impliedly admitted at or before the trial) proving, each and every of the facts and matters required to be established in an action for damages (*g*), except fraud and damage (*h*).

261. Further, it must appear, if the question is raised by the court—for obviously, except in very special cases, it is not in the representor's interest to do so—that there is something on which a judgment or order can operate, and for the undoing of which judicial intervention is requisite. That is to say, there must be a subsisting contract or transaction which, unless and until avoided by the court, is and will remain valid and binding on the parties. In strictness, the court, which does not make unnecessary orders (*i*), may decline to interfere when its aid is invoked to rescind that

(*e*) *Kingsford v. Merry* (1856), 1 H. & N. 503, Exch. Ch.; *Higsons v. Burton* (1857), 26 L. J. (EXCH.) 342; *Hardman v. Booth* (1863), 1 H. & C. 803; *Cundy v. Lindsay* (1878), 3 App. Cas. 459, H. L.; *Henderson v. Williams*, [1895] 1 Q. B. 521, C. A.; and *Morrison v. Robertson*, [1908] Sc. Ct. of Sess. Cas. 332. In all of these the representee succeeded, except in *Henderson v. Williams*, and that was only because he had estopped himself by his acts and conduct, as to which see Ch. XII, Sect. 3, *post*.

(*f*) As in *Parker v. Patrick* (1793), 5 Term. Rep. 175 (to take the earliest of this line of cases), and (passing over the intermediate authorities) *Whitehorn Bros. v. Davison*, [1911] 1 K. B. 463, C. A.

(*g*) See Ch. X, Sect. 1, *ante*.

(*h*) See Sect. 1, Sub-ss. (2) and (3) of this Chapter, *sup*.

(*i*) See *Reeve v. Gibson*, [1891] 1 Q. B. 652, (*per* VAUGHAN WILLIAMS, J., at p. 657, and WILLS, J., at p. 659, as to the unwisdom of this course).

which in fact, or in contemplation of law, does not exist, as, for instance, an alleged contract which is shown never to have been made, either because it was never concluded (*k*), or was not made by or with a person having the requisite authority in that behalf (*l*), or because the misrepresentation was such as to produce essential error of the character already described (*m*), or a contract which, though originally made, was determined by the parties before the proceedings were instituted (*n*), or was a nullity *ab initio* by reason of its contravention of a principle of common law or a statutory enactment (*o*). In many of such cases, however, relief will be granted, *ex abundanti cautela*, if the matter is not perfectly clear, or if no objection is taken by either of the parties (*p*); and it will always be granted *ex debito justitiæ* where a statutory register or other public document stands on record as *prima facie* evidence against the applicant, and where, therefore, it is just as necessary to get the entry complained of expunged or rectified in the case of a void or non-existent contract as in the case of one which is voidable only, the relief being given not against the contract which does not exist, but against the statutory register which incorrectly declares that it does (*q*). And, as will be seen hereafter (*r*), where the

(*k*) As in *Re Etna Insurance Co., Slattery's Case* (1873), Ir. R. 7 Eq. 245, where the alleged shareholder had withdrawn his application before allotment, and there was, therefore, no concluded contract. *Re Scottish Petroleum Co., Wallace's Case* (1883), 23 C. D. 413, C. A., was a case in which the shareholder attempted to show (1) that the allotment had not been made by the requisite number of directors, and (2) that the company had not unqualifiedly accepted his application, but had made a counter-proposal, which he had not accepted, and, though he failed to prove either, it was recognized by the Court of Appeal (see pp. 431, 432, 438) that if he had, he would have established his right to have his name removed from the register, on the ground, not of the voidability, but the voidness, or rather, non-existence of the contract. So also, in *Re Thomas Edward Brinsmead & Sons, Tomline's Case*, [1898] 1 Ch. 104, where it turned out, on the evidence, that there had probably been no concluded contract, a similar result might have followed, but for the omission of the shareholder to set it up in the first instance.

(*l*) This was the first of the two points raised by the shareholder in *Re Scottish Petroleum Co., Wallace's Case*, *sup.*

(*m*) See §§ 256-259, *sup.*

(*n*) As, for instance, by forfeiture, pursuant to the articles of association of a company: *Re Home Counties and General Life Insurance Co., Ex parte Woollaston* (1859), 7 W. R. 645 (*per* KNIGHT-BRUCE and TURNER, LL.JJ.); *Re London and Mediterranean Bank, Wright's Case*, No. 1 (1871), L. R. 12 Eq. 334 n.; and *Re Same Co., Wright's Case*, No. 2 (1871), 7 Ch. App. 55; and *Aaron's Reefs, Ltd. v. Twiss*, [1896] 7 A. C. 273, 293, H. L. The rule of course assumes that the forfeiture was *bonâ fide*. Where it was a fraudulent device of the shareholder, in collusion with the company's secretary, the contract was held not to have been put an end to: *Re London and Provincial Starch Co., Gowers' Case* (1868), L. R. 6 Eq. 77 (*per* GIFFARD, V.-C., at p. 81: "the so-called forfeiture was mere machinery for enabling them to get rid of their liability"). As to the means of checkmating a similar manœuvre on the part of the company, when threatened with proceedings for rescission, see § 275, and note (*k*) thereto, *post*.

(*o*) Contracts, the object of, or consideration for, which is illegal, or immoral, or against public policy, or which, though not indictable or illegal, are made void by statute.

(*p*) Thus, in the three cases cited in notes (*s*), (*t*), and (*u*) to § 258, *ante*, where the instrument was clearly void, the court nevertheless set it aside.

(*q*) See several of the cases cited in notes (*k*) and (*n*), *sup.*, and Sect. 3, Sub-s. (3) and (4), *post*, and the authorities cited in the notes thereto.

(*r*) Sect. 3, Sub-s. (1), *post*.

representor is in physical possession of an instrument not obviously void on its face, and which may still be used to harass the representee, the court will make an order for its delivery up to be physically cancelled or destroyed.

262. Not only must there be a subsisting and a valid, though voidable, contract or transaction, in order to justify the interference of the court, but such contract or transaction must be executory, on one side or the other. If it has been completed by conveyance, or otherwise fully executed and exhausted on both sides, rescission will always be peremptorily refused, subject to the two exceptions mentioned below (*s*); such refusal being not a mere matter of discretion or of the reluctance of the court to make unnecessary orders, or "to slay the slain," as in the class of case just considered, but the absolute right of the representor (*t*). The mere fact, however, that one of the parties, during the currency of the contract, has become entitled to benefits in certain events, which have not happened, whilst the other has been at a corresponding risk, does not make the contract an executed one; for, at that rate, every voidable contract might be said to be executed (*u*).

263. The first of the two exceptions above referred to is where the misrepresentation was characterized by fraud, which not only vacates and vitiates every transaction known to the law, even the most ceremonial and solemn, but denies even to conveyance, completion, and long fruition the immunity which would otherwise attach to them. This rule, recognized in cases where the facts were not sufficient to establish the fraud alleged (*x*), has always been vigorously applied, whenever they were (*y*).

264. There is not so much, or so clear, authority in favour of the second exception, which, however, seems to be as well established now in English, as it always has been in Scottish, jurisprudence. The exception in question relates to those cases in which, though there has been no fraud or *mala*

(*s*) See §§ 263, 264, *inf*.

(*t*) On this ground the representee was denied relief of the character in question in *Atwood v. Small* (1838), 6 Cl. & Fin. 232; *Wilde v. Gibson* (1845), 1 H. L. C. 605; *Brownlie v. Campbell* (1880), 5 App. Cas. 925, H. L.; *Soper v. Arnold* (1887), 37 C. D. 96, C. A., affirmed (1889), 14 App. Cas. 429, H. L.; *May v. Platt*, [1900] 1 Ch. 616; *Debenham v. Sawbridge*, [1901] 2 Ch. 98; *Re Metal Constituents, Ltd., Lord Lurgan's Case*, [1902] 1 Ch. 707, 709; *Seddon v. North Eastern Salt Co.*, [1905] 1 Ch. 326; *Milch v. Coburn* (1910), 27 T. L. R. 170; and *Angel v. Jay*, [1911] 1 K. B. 666, Div. Ct. (where a lease was vainly sought to be distinguished from a conveyance).

(*u*) *Kettlewell v. Refuge Assurance Co.*, [1908] 1 K. B. 545, C. A., at pp. 549-551.

(*x*) For instance, by Lord COTTENHAM, L.C., at pp. 349, 352 of *Atwood v. Small*, *sup.*, and at p. 625 of *Wilde v. Gibson*, *sup.*; by Lord CAMPBELL at pp. 632, 633 of the last case; by Lord SELBORNE, L.C., at p. 937 of *Brownlie v. Campbell*, *sup.*; by COTTON, L.J., at pp. 101, 102 of *Soper v. Arnold*, *sup.*, in the C. A.; and by FARWELL, J., at p. 623 of *May v. Platt*, *sup.*

(*y*) Instances are: *Sturge v. Sturge* (1849), 12 Beav. 229; *Reynell v. Sprye*, *Sprye v. Reynell* (1852), 1 De G. M. & G. 660; *Garraud v. Frankel* (1862), 30 Beav. 445; *Harris v. Pepperell* (1867), L. R. 5 Eq. 1; and *Paget v. Marshall* (1884), 28 C. D. 255. In *Feret v. Hill* (1854), 15 C. B. 207, though common law had then no jurisdiction to give relief, the estate having passed, it seems to have been recognized that it might have been otherwise in equity. In *Charter v. Trevelyan* (1844), 11 Cl. & Fin. 714 (a non-disclosure case) a conveyance, after thirty-seven years, was rescinded.

praxis, there has been a misrepresentation leading to *error in substantia-libus*, or "essential error," that is to say, where the representee has received under the contract something totally different, in substance and nature, from that which was represented. In Scots law this rule has never been doubted, and it is contained in all the Scotch institutional treatises, such as Bell's *Principles*, the relevant passage from which was cited by Lord SELBORNE, L.C., in the House of Lords, and adopted, as representing not merely the law of Scotland, but that of England and Ireland as well (z). And there are at least four authorities in this country, ranging from the middle of the eighteenth century down to quite recent times in which the principle has been declared or applied (a).

265. Where, by a term in the contract or one of its conditions, the parties have agreed that compensation is to take the place of rescission, and the period within which such compensation is payable is not expressly limited, the above rules are inapplicable, for it is immaterial to the question of monetary relief whether the contract has been completed or not, and, in any such case, accordingly, compensation not only may, but must, be awarded to the representee, if his right to it is established in all other respects, even after conveyance or full execution on both sides, and at any time thereafter which is not beyond any period of statutory limitation. This doctrine was for some time doubted, and perhaps not unreasonably, for it certainly would at the first blush appear that the same rule should apply to the substituted form of relief as to the form for which it is substituted, and that the pecuniary equivalent of rescission would naturally be contemplated as payable within the same limits of time as those within which the representee could have avoided the contract if he had not agreed to accept such equivalent instead; but the rule has now been definitely established by the Court of Appeal (b), and such previous authorities and judicial opinions as denied or questioned its validity have been expressly overruled (c).

(z) At p. 937 of *Brownlie v. Campbell*, *sup.*, where, after quoting the proposition in Bell's *Principles* as to both the exceptions referred to in the text, viz. (1) *fraud*, and (2) *error in substantia-libus*, he observes: "it appears to me that the cases which have been decided in this country and in Ireland are to the same effect."

(a) *Bingham v. Bingham* (1748), 1 Ves. Sr. 126; *Cooper v. Phibbs* (1867), L. R. 2 H. L. 149, *per* Lord CRANWORTH at p. 164, who there expressly approves *Bingham v. Bingham*; *Jones v. Clifford* (1876), 3 C. D. 779, *per* HALL, V.-C., at pp. 791, 792; and *Debenham v. Sawbridge*, [1901] 2 Ch. 98, *per* BYRNE, J., who refers to the previous cases on this point, and, at p. 109, draws the unhesitating conclusion that "this" (*sc.* rescission) "is relief which may undoubtedly be granted in a proper case, even after conveyance, although there has been nothing in the nature of fraud." It will be noticed, when the affirmative plea of an express agreement to accept compensation in lieu of annulment—see Sect. 4, Sub-s. (3), *post*—comes to be dealt with, that precisely the same two conditions will operate to defeat the plea, and entitle the representee to rescission notwithstanding his agreement, as entitle him thereto notwithstanding conveyance or complete execution.

(b) *Palmer v. Johnson* (1884), 13 Q. B. D. 351, C. A., in which case *Bos v. Helsham* (1866), L. R. 2 Exch. 72 was distinctly approved and followed, and the cases and opinion cited in the next note which were in conflict with the view there expressed were disapproved.

(c) The decisions referred to were those of MALINS, V.-C. (three in number), in the years 1878 and 1879, and both these, and also the opinion of WATKIN WILLIAMS, J.,

266. That which is more than a contract can no more be rescinded for misrepresentation than that which is less than a contract, or is no contract at all. For instance, matrimony which, though in a sense a contract (*d*), is also a great deal more, inasmuch as it confers status and legitimacy, or, in the words of the Book of Common Prayer, a "holy estate," is not voidable on the ground of misrepresentation at the option of the party misled. It may, indeed, be the subject of a decree of nullity, obtainable of course only in the Divorce Court, if it can be shown that the misrepresentation was of such a character as would render any ordinary contract founded upon it void *ab initio*, and not merely voidable,—a misrepresentation, for instance, as to the identity of one of the spouses, or as to the entire nature of the ceremony, for in that case there would be the mere appearance without the reality of consent, so that, notwithstanding the outward forms of solemnization, there never was, in truth or in law, any marriage at all (*e*); but in no other case is marriage dissoluble in the Divorce Court, or elsewhere (*f*). And even a settlement, for which marriage is the consideration, cannot be nullified for any other cause, or in any other court, than the marriage itself can be (*g*): The previous contract of betrothal, however, or, as it was correctly styled in former times, "the pre-contract" of marriage, may be the subject of rescission or of a defence to any action to enforce the promise, if it was brought about by material misrepresentation, in the same way as any other contract (*h*).

267. Though in some of the authorities there are loose expressions to be found suggestive of the idea that it is part of the representee's burden of proof to establish that some notice or act of repudiation was given or done by him before commencing the proceedings, it is clear that this is not so, and that the action itself is sufficient to signify his election (*i*).

in *Joliffe v. Baker* (1883), 11 Q. B. D. 255, Div. Ct., if intended in any way to contradict the principle of *Bos v. Helsham*, were overruled by the C. A. in *Palmer v. Johnson*, *sup.*

(*d*) *Matrimonium* is rather the act of conveyance, or *traditio*, whereby the contract of betrothal is completed, than a contract in itself. One reason for its being regarded as a contract is the fact that all the formal declarations of the marriage ceremony are based upon the *sponsiones* and *responsiones* of the Roman contract of *stipulatio*, as is pointed out by Dr. W. E. Ball in an interesting discussion of this topic at pp. 46–49 of his *St. Paul and the Roman Law*.

(*e*) See §§ 256–259, as to these two grounds in the cases of ordinary contracts. GORELL BARNES, P., granted a decree of nullity on the latter of them in *Hall v. Hall* (1908), 24 T. L. R. 766.

(*f*) *Swift v. Kelly* (1835), 3 Knapp, 257; 40 R. R. 22; *Ford v. Stier*, [1896] P. 1 (JEUNE, P.); and *Moss v. Moss*, [1897] P. 263 (JEUNE, P.). The observations of BUTT, J., to the effect that any marriage may be the subject of a decree of nullity on the same grounds as those upon which any contract may be rescinded, in *Scott v. Sebright* (1886), 12 P. D. 21, are clearly not law, though the decision itself may be supported on the theory that the facts of that case indicated, not a real consent induced by misrepresentation, but an absence of any consent at all.

(*g*) *J. v. J.* (1884), 53 L. J. (CH.) 1014, *per* PEARSON, J.

(*h*) See, for instance, *Hall v. Wright* (1859), E. B. & E. 746; *Beachey v. Brown* (1860), E. B. & E. 796; and *Baker v. Cartwright* (1861), 10 C. B. (N. S.) 124.

(*i*) *Clough v. London and North Western Railway Co.* (1871), L. R. 7 Exch. 26, Exch. Ch., *per* Cur. at p. 36; and *Capel & Co. v. Sim's Ships Composition Co.* (1888), 58 L. T. 807, *per* KEKEWICH, J., at pp. 811, 812. Cp., as to voidable contracts and

The onus is on the representor to prove, by way of affirmative defence, a previous election on the representee's part to adhere to the contract (*k*), and not on the representee to prove a previous election to avoid it, except in certain special classes of case (*l*); though of course it is always wise in the representee's own interests, and in order to anticipate such affirmative plea, to make some previous declaration of his attitude (*m*), and, in the majority of cases, this precautionary step is taken.

SECT. 3. FORM AND EXTENT OF RELIEF.

268. The primary purpose of all proceedings for rescission, as contrasted with that of actions for damages, is to restore the *status quo*, to bring back the original position by undoing all that has intervened between it and the present (*n*). From this main principle certain very important derivative rules necessarily follow. In the first place, the restitution must be *in specie*, for, if it cannot be so effected, rescission cannot be granted either (*o*), any more than, if it were a question of enforcing the contract directly, instead of annulling it directly, relief could be given if the parties were not in a position to perform it *in specie*. In the next place, it must be mutual,—that is, if the representee is still in possession of any property or rights derived by him under the contract or transaction sought to be avoided (*p*); for it is obviously of the essence of the equity that in such cases both parties, and not one only, should be reinstated (*q*). Thirdly, though the contract has always been voidable only until declared void or avoided by order of the court, yet that declaration or order, when once made, relates back to the date of the contract, so as to nullify all mesne dispositions of property and acts consequential upon the contract which have taken place during the intervening period (*r*), which may be compared to the “period of relation back” in cases of insolvency of individuals or companies, and, on the other hand, contrasted with the period which elapses between the making of a contract and the date at which, without default of either party, the performance of it in the manner intended

transactions generally, *Hyde v. Watts* (1843), 12 M. & W. 254, *per Cur.* at p. 270: “we all think that no act or intimation of election on the part of the plaintiff to avoid the deed was necessary, before bringing the action.”

(*k*) See Sect. 4, Sub-s. (4), *post*.

(*l*) As, for instance, in the class of case mentioned in Sect. 4, Sub-s. (6), *post*.

(*m*) See Sect. 4, Sub-s. (7), *post*.

(*n*) As contrasted with the opposite function of the action for damages which is to compensate the representee, once for all, by the equivalent in money of the loss he has sustained by reason of an alteration of position which, whether by choice of the representee or force of circumstances, has become irrevocable.

(*o*) See Sect. 4, Sub-s. (5), *post*.

(*p*) If the representee has nothing to restore, the rule of course has no application. In that event, his remedy is an action of the nature limited in Sub-s. (2) of this Section, *inf*.

(*q*) Here, again, the analogy of actions for specific performance holds. In such actions the order is only made subject to the plaintiff's making out a good title, or otherwise performing his part of the contract.

(*r*) *Reese River Mining Co. v. Smith* (1869), L. R. 4 H. L. 64, *per Lord HATHERLEY*. L.C., at pp. 73, 74, Lord WESTBURY at pp. 77, 78, and Lord CHURCH at p. 81.

becomes impossible by reason of some event which destroys that which was contemplated as its foundation, and where, therefore, the law regards what is past as irrevocably past, and gives neither party any right of recovery or otherwise against the other in respect of any payment, act, or liability, made, done, or incurred, during such period (s). Lastly, the rescission must be *in toto*, or not at all (t), unless there are separate and severable covenants or stipulations, or several parties or interests, to be dealt with, or the instrument sought to be avoided is one that has two objects and is put in suit in two characters; in any of which cases, if the other circumstances justify such an order, the court may rescind one of such covenants or stipulations without interfering with the others (u); or set aside the contract against one of such parties in respect of some partial and severable interest of the representee without affecting the position of the others or requiring them to be joined (x); or allow the instrument to stand in one of its characters, for instance as a security, whilst rescinding it in the character in which it is put forward, e.g. a conveyance (y).

269. The above are the root principles on which relief by way of avoidance is granted, or refused, in whichever of the various possible forms of proceeding that relief may be sought. These forms comprise (1) the ordinary action for rescission, (2) the action for money had and received, or for delivery up of property, where the representee has nothing to restore in exchange for the money or property which he seeks to recover, and which recovery, therefore, is the only remedy which concerns his interests, (3)

(s) See the various treatises on Bankruptcy, and Companies, as to the "period of relation back" in bankruptcy, and in the liquidation of companies respectively. As to the rule, on the other hand, that where a contract is rendered impossible of performance in the manner indicated in the text, the law leaves the parties as it finds them, and does not attempt to undo the past, see, amongst other cases, *Taylor v. Caldwell* (1863), 3 B. & S. 826, and the cases arising out of the postponed Coronation of King Edward VII., particularly *Krell v. Henry*, [1903] 740, C. A., and *Chandler v. Webster*, [1904] 1 K. B. 493, C. A.

(t) *Myddleton v. Lord Kenyon* (1794), 2 Ves. 391, per Lord ELDON, L.C., at p. 408; *Beaumont v. Dukes* (1822), Jacob, 422; 23 R. R. 110 (per PLUMER, M.R., at p. 426: "it must stand or fall to the full extent"); *Clarke v. Dickson*, No. 1 (1858), E. B. & E. 148 (per CROMPTON, J., at p. 155: "the plaintiff must rescind *in toto* or not at all"); and *United Shoe Machinery Co. of Canada v. Brunet*, [1909] A. C. 330, P. C. (at p. 340).

(u) As to a deed containing several distinct covenants, which for that purpose may be regarded as two deeds written on one parchment, see Com. Dig. Falt. B. 2, on the authority of which SWINSEN-EADY, J., in *Bagot v. Chapman*, [1907] 2 Ch. 222, held that the mortgage-deed before him might be regarded as good *quoad* one of the covenants, and "ab initio void for the residue" (pp. 227, 228). In *Howatson v. Webb*, [1908] 1 Ch. 1, C. A., though it was doubted whether the application of the principle to the circumstances of *Bagot v. Chapman* was justified (see the observations of FARWELL, L.J., at p. 2, and COZENS-HARDY, M.R., at pp. 2, 3), the validity of the principle itself was not disputed.

(x) See the opinion to this effect of Lord LANGDALE, M.R., at pp. 356, 357 of *Harley v. Stone* (1840), 3 Beav. 355.

(y) Thus in *Haygarth v. Wearing* (1871), L. R. 12 Eq. 320, WICKENS, V.-C., made a declaration that the deed there in question was void as a conveyance, but good as a security. So, in *Re Gomersall* (1875), 1 C. D. 137, C. A., affirmed *sub nom. Jones v. Gordon* (1877), 2 App. Cas. 616, H. L., the bills of exchange which were the subject of the proceedings, were held to be good as securities for certain portions of their face value, but void as to the residue.

the summary proceedings authorized by statute for rectification of a company's register of members, in cases of contracts to take shares therein, (4) the like proceedings to vary the list of contributories, where the company is in liquidation, (5) applications to be discharged from a contract of sale and purchase under the direction of the court in a pending matter, and (6) physical recapture and resumption of the property the subject of the contract, wherever it may be found, without invoking any judicial interposition at all. The above are the only lawful methods of asserting the right to avoid a contract or transaction induced by misrepresentation (z), and it remains to consider them separately, and in order.

Sub-sect. (1). Action for Rescission.

270. An action for rescission in the usual and normal form of proceeding for obtaining a judicial annulment of a contract induced by misrepresentation. On proof of the several matters as to which the onus rests on him (a), the representee has always succeeded in such action, though the exact nature of the consequential relief varies according to the circumstances of the individual case (b). The principal classes of contracts which have been set aside in actions of this nature comprise those relating to:—sales, mortgages, or leases of land (c); sale or transfer of goods or securities (d); insurance (e); sales of a business, a partnership interest, a practice, and the like (f); compromises (g); applications for shares in companies (h);

(z) The Vendor and Purchaser Act, 1874, does not authorize the decision of any question relating to the *validity* of the contract: see § 424, *post*.

(a) See Sect. 2, *ante*.

(b) See § 271, *inf*.

(c) Examples of successful actions for rescission of contracts of this type are: *Murray v. Palmer* (1805), 2 Sch. & Lefr. 472; *Kennedy v. Green* (1834), 3 My. & K. 699; *Roddy v. Williams* (1845), 3 Jo. & Lat. 1; 72 R. R. 1; *Reynell v. Sprye, Sprye v. Reynell* (1852), 1 De G. M. & G. 660; *Stanton v. Tattersall* (1853), 1 Sm. & G. 529; *Cooper v. Phibbs* (1867), L. R. 2 H. L. 149; *Torrance v. Bolton* (1872), 8 Ch. App. 118; *Lindsay Petroleum Co. v. Hurd* (1874), L. R. 5 P. C. 221; *Lemprière v. Lange* (1879), 12 C. D. 675; *Re Arnold* (1880), 14 C. D. 270, C. A.; *Smith v. Land and House Property Corporation* (1884), 28 C. D. 7, C. A. (counter-claim); *Nottingham Patent Brick and Tile Co. v. Butler* (1886), 16 Q. B. D. 778, C. A.; *Whittington v. Seale-Hayne* (1900) 82 L. T. 49; *Jacobs v. Revell*, [1900] 2 Ch. 858; *Baker v. Moss* (1902), 66 J. P. 360; and *Mahomed Kala Mea v. A. V. Harperink* (1908), 25 T. L. R. 180, P. C. Cp. also some of the cases cited in the notes to Sect. 4, Sub-s. (5), *post*, and to Ch. XIII, Sect. 2, Sub-s. (1), *post*, as to sales by the court, and auction sales, respectively.

(d) For illustrations of this class, see *Stainbank v. Fernley* (1839), 9 Sim. 556 (shares); *Wilson v. Short* (1847), 6 Hare, 366 (iron); *Murray v. Mann* (1848), 2 Exch. 538 (a horse); *Walsham v. Stainton* (1863), 1 De G. J. & S. 678 (securities); *Maturin v. Tredennick* (1864), 12 W. R. 740 (the like); *Donaldson v. Gillett* (1866), L. R. 3 Eq. 274 (the like); *Moorhouse v. Woolfe* (1882), 46 L. T. 374 (a bill of sale); *Mathias v. Yetts* (1882), 46 L. T. 497, C. A. (stock); and *Whurr v. Devenish* (1904), 20 T. L. R. 385 (a horse). And cp. some of the cases cited in the notes to Ch. XIII, Sect. 2, Sub-s. (2), *post*.

(e) See *Fenn v. Craig* (1838), 3 Y. & C. 216; *Traill v. Baring* (1864), 4 De G. J. & S. 318; *Life and Health Assurance Association v. Yule* (1904), 6 F. 437. The vast majority of insurance cases are cases in which the misrepresentation was set up as a defence. See Ch. XII, *post*.

(f) *Stainbank v. Fernley* (1839), 9 Sim. 556; *Rawlins v. Wickham* (1858), 3 De G. & J. 304; *Redgrave v. Hurd* (1881), 20 C. D. 1, C. A. (counter-claim).

(g) *Beadley v. Burch* (1839), 10 Sim. 332; *Davis v. Chanter* (1855), 3 W. R. 321; *Brooke v. Mostyn (Lord)*, (1865), 33 Beav. 457; *Fane v. Fane* (1875), L. R. 20 Eq. 698; and *Re Roberts*, [1905] 1 Ch. 704, C. A.

(h) *Central Railway Co. of Venezuela v. Kisch* (1867), L. R. 2 H. L. 99; *Henderson*

and miscellaneous subject-matters not admitting of classification (*i*). Action, of course, includes counter-claim (*k*).

271. The object of the action being to avoid both the contract or transaction itself, and also the consequences which have flowed, and which, but for its avoidance, would thereafter flow from it, it follows that the relief granted must comprise, first, a declaration, or at least a decision, that the contract or transaction is void, and must be deemed to have been so *ab initio* (*l*); secondly, an order for the setting aside or cancellation of such contract or transaction, and, in certain cases, for the physical surrender of the instrument of contract to the representee (*m*); thirdly, provisions for the repayment or retransfer to the representee of all moneys, property, or benefits, if any, which the representor has received under the contract or transaction, on the terms of the like restitution to the representor of all moneys, property, or benefits, if any, which the representee has received thereunder (*n*); and, lastly, such terms, if any, as may be reasonably required in order to protect the parties from future enforcement by either of them against the other of any rights derived therefrom (*o*).

272. Though not strictly necessary, it is not unusual to prefix to the order for rescission a formal and express declaration that the contract is void (*p*), which, as has been pointed out (*q*), means that it is declared to have been a nullity from the commencement. Such a declaration is a convenient preface to, and the logical justification of, the judicial orders and directions which follow it. Like the preamble to a statute which *incipit a jussione*, it can be dispensed with, since the order for rescission necessarily involves and presupposes a judicial determination to the same effect as that which is directly pronounced by a declaration; but, for the prevention of subsequent disputes as to the meaning and grounds of the judgment (if, for instance, where *res judicata* should be set up), it may serve a useful purpose, just as a preamble may, in cases of doubtful construction, be

v. Lacon (1868), L. R. 5 Eq. 249; *Kent v. Freehold Land and Brickmaking Co.* (1868), 3 Ch. App. 493; *Ross v. Estates Investment Co.* (1868), 3 Ch. App. 682; *Reese River Silver Mining Co. v. Smith* (1869), L. R. 4 H. L. 64; *Re London and Leeds Bank, Carling's Case*, *Carling v. London and Leeds Bank* (1887), 56 L. J. Ch. 321; *Capel & Co. v. Sim's Ships Composition Co.* (1888), 58 L. T. 807; *Scott v. Snyder Dynamite Projectile Co.* (1892), 67 L. T. 104, C. A.; *Greenwood v. Leather Shod Wheel Co.*, [1900] 1 Ch. 421, C. A.; and *Component Tube Co. v. Naylor*, [1900] 2 Ir. R. 1.

(*i*) Such as *Cooper v. Joel* (1859), 1 De G. F. & J. 240 (guarantee); *A.-G. v. Ray* (1874), 9 Ch. App. 397 (annuity); and the cases where an instrument of which the character and nature had been misrepresented, was (though perhaps unnecessarily) set aside: see notes (*s*), (*t*), and (*u*) to § 257 in Sect. 1, Sub-s. (4), *ante*.

(*k*) In *Redgrave v. Hood*, *Smith v. Land and House Property Corporation*, and *Component Tube Co. v. Naylor*, *sup.*, the relief was granted to a counter-claiming defendant. In *Reynell v. Sprye*, *Sprye v. Reynell*, which was decided before counter-claims were introduced, *Sprye* obtained an order for rescission by cross-bill.

(*l*) See § 272, *inf.*

(*m*) See § 273, *inf.*

(*n*) See § 274, *inf.*

(*o*) See § 275, *inf.* The various kinds of relief obtainable in an action of rescission from the subject of Article 35 of the Code.

(*p*) This was done in most of the cases cited in the notes to this Sub-section.

(*q*) In § 268, *ante*, and note (*r*) thereto.

used as a key to the interpretation of the express provisions of a statute (*r*). And there may even be cases where such a declaration is substantially the sole remedy which for the moment is required (*s*).

273. The order for rescission relates to the contract or transaction in question, whether in writing (as is ordinarily the case) or oral. If in writing the contract may consist of, or be contained in, more than one document, in which case every one of such documents is the subject of the order, and in some cases, as has already been seen (*t*), conveyances or other instruments executed for the purpose of completing or carrying out, or otherwise consequential upon, the contract, may be set aside, as well as the contract itself. Further, in any case where there is a statutory register or book the entries in which are declared by the legislature to be *primâ facie* evidence of any contract or title purporting to be recorded therein, such as the register of members under the Companies (Consolidation) Act, 1908, the court will, as part of the relief granted, direct that such entry be expunged or rectified (*u*). "Rescission," though its literal meaning is "tearing up," is ordinarily understood in a metaphorical or secondary sense. But, where the instrument is in the physical possession or control of the representor, he will be directed by the court to physically deliver it up to be destroyed or cancelled, unless its defect or invalidity appears on the face of it, and even in such a case he will be ordered to do so, if his conduct has been proved to have been of such a character as to render it probable that he may in the future make an unconscionable use of the instrument by harassing and vexatious (even though hopeless) litigation, or if in any way it may, in the hands of the representor, or of third parties to whom he may transfer it, constitute "a cloud upon the title" of the representee, or otherwise hamper him in the enjoyment of his rights (*x*). The

(*r*) It has become the practice to exclude preambles from modern public statutes, a very unfortunate practice, since the interpreters of these instruments are thereby deprived of that which, having regard to the slipshod drafting characteristic of most of them, might be an important, if not the sole, guide to the meaning of the legislature.

(*s*) An example of such a case is *Brooke v. Mostyn (Lord)*, (1865), 33 Beav. 457, where TURNER and KNIGHT-BRUCE, LL.JJ., reversing ROMILLY, M.R., made a declaration that a compromise of a suit for the recovery of a legacy, and the order of the court approving it, were not binding on the plaintiff, to whom they gave liberty to prosecute such suit as he might be advised.

(*t*) See §§ 263, 264, *ante*.

(*u*) Thus, as part of the relief granted in the action, the register of members was ordered to be rectified in *Kent v. Freehold Land and Brickmaking Co.* (1868), 3 Ch. App. 493; *Henderson v. Lucan* (1868), 3 Ch. App. 682; *Reese River Silver Mining Co. v. Smith* (1869), L. R. 4 H. L. 64; *Re London and Leeds Bank, Carling's Case, Carling v. London and Leeds Bank* (1887), 56 L. J. (CH.) 321; *Greenwood v. Leather Shod Wheel Co.*, [1900] 1 Ch. 421, C. A.; and *Components Tube Co. v. Naylor*, [1900] 2 Ir. R. 1. As to the summary procedure authorized by the statute, see Sub-s. (3), *post*.

(*x*) The principal cases in which this topic is debated are: *Bromley v. Holland* (1802), 7 Ves. 3; 6 R. R. 58 (per Lord ELDON, L.C., at p. 21); *Ryan v. Macmath* (1819), 3 Brown C. C. 15 (per Lord THURLOW, L.C., at p. 16); *Duncan v. Worrall* (1822), 10 Price, 31; 24 R. R. 695 (at p. 42); *Simpson v. Lord Hounden* (1837), 3 My. & Cr. 97 (per Lord COTTENHAM, L.C., at p. 102); *Fenn v. Craig* (1838), 3 Y. & C. (EXCH.) 216; 51 R. R. 365 (per ALDERSON, B.); *Cooper v. Jock* (1859), 1 De G. F. & J. 240 (per Lord CAMPBELL, L.C., at pp. 215, 216), affirming Lord ROMILLY, M.R., in the court below, reported 27 Beav. 313 (see p. 317); and *Onions v. Cohen* (1865), 2 H. & M. 354 (per PAGE-WOOD, V.-C.). In *Moorhouse v. Woolfe* (1882), 6 L. T. 371,

above rules are now well settled, though in early times equity judges seem to have been rather chary of exercising their jurisdiction in this respect, deeming it apparently something of a profanity to lay violent hands upon a solemnly executed instrument and hesitating, as Portia did in a memorable case (*y*), to "tear the bond," unless with the consent of the parties.

274. Having decreed rescission, the next step in the remedial procedure of the court is to provide for the undoing of the past on both sides, by mutual restoration *in specie* of all benefits, if any, received by each party under the contract (*z*). The representor must repay all moneys (*a*), and, unless the circumstances are exceptional, with interest (*b*), and reconvey or retransfer or redeliver (by appropriate instruments, where necessary) all property and rights, whether in possession or in action, which he has received (*c*), on the terms that the representee on his part makes a corresponding restoration, or allowance in account (*d*). For this purpose, all

the bill of sale there in question was ordered to be delivered up by the representor moneylender as a matter of course, without cavil or question on his part.

(*y*) *Shylock v. Antonio*, reported in verse by William Shakespeare, *sub nom. The Merchant of Venice*, Act IV, Sc. 1, where the deputy of the "learned Bellario," appointed assessor to the court of which the Doge was President, urges the plaintiff—"bid me tear the bond," which shows that the "wise young judge" did not consider that this could be done without the plaintiff's permission. Even after the declaration of the court that the bond was void on the ground of statutory illegality, it does not appear from the narrative of the learned and gifted reporter that the bond was ordered to be given up to the defendant, or that it was in fact torn or destroyed by the acting Associate, the learned Nerissa, or any other officer of the court.

(*z*) If the representor has received nothing, or if neither party has received anything, this kind of relief is not required. On the other hand, if the representee has received nothing, but the representor has acquired under the contract money or chattels capable of manual delivery, the representee's remedy is of the kind described in Sub-s. (2), *inf.*

(*a*) No difficulty ever arises as to the order for repayment of money, which is common form. See the cases generally.

(*b*) There is no doubt about the right of the representee, in all ordinary cases, to interest on such moneys from the date of the representor's receipt thereof to the date of the judgment: such interest being regarded as restitution, and not damages: see *Re Metropolitan Coal Consumers Association, Karberg's Case*, [1882] 3 Ch. 1, C. A. at p. 17. As to the rate of interest, the practice of the courts has not been uniform. Whenever fraud or misconduct is proved, 5 per cent. is now usually allowed: see, for instance, *Capel & Co. v. Sim's Ships Composition Co.* (1888), 58 L. T. 807 (*per KEKEWICH, J.*, at p. 811), and *Greenwood v. Leather Shod Wheel Co.*, [1900] 1 Ch. 421, C. A. On the other hand, in *Ravelins v. Wickham* (1858), 3 De G. & J. 304, and *Newbiggin v. Adam* (1886), 34 C. D. 582, C. A., 4 per cent. only was given. And this is the usual rate of interest allowed where the deposit is ordered to be returned on the rescission of a contract for the sale of land: see, for instance, *Jacobs v. Revell*, [1900] 2 Ch. 858. In *Henderson v. Lacon* (1868), L. R. 5 Eq. 249, PAGE-WOOD, V.-C., for some reason (not stated) disallowed interest altogether (see pp. 263, 264).

(*c*) This also is ordinary practice. See generally the cases cited in the notes to this Section, and particularly *Addis v. Campbell* (1841), 4 Beav. 401.

(*d*) See *Addis v. Campbell, sup.* Where it is a mere question of money payments, or of accounts, no difficulty arises, as, for instance, where the representee is entitled to receive back his application or call moneys on a subscription for shares in a company, less any dividends he may have received thereon, or where, as in *Addis v. Campbell, sup.*, and in *Haygarth v. Wearing* (1871), L. R. 12 Eq. 320, the representor is ordered to account for the rents and profits of the land which he acquired under the contract, against which the representee is required to allow the cost of permanent improvements (if any) made by the representor. In *Stainbank v. Fernley* (1839), 9 Sim. 556, the representee was required to give the representor an indemnity against liability on the shares the purchase of which was set aside, as well as to retransfer them, and account for dividends, as a condition of relief. Where the representee is required to give back

necessary accounts and inquiries will be directed (e). The representor must indemnify the representee against all payments made by him pursuant to obligations under which he came in virtue of the contract, but not against all payments made pursuant to obligations or matters "arising out of the contract," for this expression, if construed literally, would be wide enough to include damages in the ordinary sense, which clearly cannot be awarded in rescission proceedings (f). In certain cases of misrepresentation of title by a vendor, the purchaser is allowed the costs of investigating such title (g).

275. Where it is necessary to protect the representee from possible attempts in the future on the part of the representor to enforce against him any term of the rescinded contract, or to deal with property acquired thereunder as if there had been no rescission, a perpetual injunction will be granted at the trial in terms adequate to meet the particular mischief contemplated; as, for instance, to restrain a representor from transferring shares (h), or making calls (i), in company cases, or parting with furniture obtained under a contract of sale which has been set aside (j). Further, a representee is entitled, on proper terms, to an interlocutory injunction restraining the representor until the trial of the action from forfeiting property of the representee under powers conferred by the contract sought to be rescinded, and which the representee has repudiated, and cannot,

property other than money, and he is unable to do so *specifically*, no rescission can be ordered: see Sect. 4, Sub-s. (5), *post*.

(e) See *Addis v. Campbell*, and *Haygarth v. Wearing*, *sup.*, and the rescission cases generally.

(f) In *Newbigging v. Adam* (1856) 34 C. D. 552, C. A., this question was elaborately discussed. The qualified proposition stated in the text represents the view of BOWEN, L.J. Some of the expressions used by COTTON, L.J. (at pp. 588-590) possibly, and those of FRY, L.J. (at p. 596) certainly, are of a wider and more unqualified character, and, to that extent, are not sound. In the House of Lords, this case *sub nom. Adam v. Newbigging* (1888), 13 App. Cas. 309, H. L., was so dealt with that it became unnecessary to decide the point in question, and Lord WATSON (p. 324), and Lord HERSCHELL (p. 341) expressly declined to express any opinion on it. In *Whittington v. Seale-Hayne* (1900), 82 L. T. 49, FARWELL, J., after noticing the above divergent language in the judgments of the C. A. in *Newbigging v. Adam*, *sup.*, expressed his preference for that of BOWEN, L.J., and applied the doctrine as enunciated by that Lord Justice to the circumstances of the case before him, which were these. The plaintiffs had been induced to take a lease of premises by a false representation that they were in sanitary condition and in good repair. The plaintiffs used the premises for breeding prize poultry. The relief prayed, besides rescission, was (1) indemnity against the costs incurred by them in connection with the requirements of the local authority that the premises should be put in good and sanitary state or repair, and against rent, rates, and taxes, and the expense of repair generally, and (2) value of stock lost during their occupation of the premises, loss of profit on the sale of such stock, loss of breeding season, etc. FARWELL, J., in accordance with the principles stated in the text, held that the plaintiffs were entitled to (1), but not to (2), a representee under such circumstances having a right to consequential relief only "so far as regards the rights and obligations which had been created by the contract into which he was induced to enter," and not to an indemnity against "losses arising out of the contract" generally, which would include damages, and claim (2) being obviously in the nature of such damages, and none the less so, because they were described in the prayer for relief as "indemnity."

(g) See, for instance, *Carlisch v. Salt*, [1906] 1 Ch. 335.

(h) *Walsham v. Stainton* (1863), 1 De G. J. & S. 678.

(i) *Henderson v. Lacon* (1868), L. R. 5 Eq. 249.

(j) *Lemprière v. Lange* (1879), 12 C. D. 675.

therefore, consistently with the attitude he has taken up, recognize. By such an order an ingenious device of companies, in shareholders' actions, may now be checkmated (*k*), the only case in which it succeeded having been overruled (*l*).

Sub-sect. (2). Action for Money Had and Received, etc.

276. Where the representee has received nothing under the contract or transaction, and has nothing therefore to restore to the representor as the condition of relief, but has paid money thereunder, or where the representor is not enforcing the contract, or attempting or intending to enforce it, or has abandoned it (*m*), the representee's claim is simply for the recovery of the money which he has paid, and is the proper subject of an action for money had and received. This form of proceeding is one of those equitable remedies introduced by Lord MANSFIELD into the common law on the lines of Roman jurisprudence, the salutary effect of which is attested alike by the contemporary denunciations of Junius, and the subsequent approval and adoption of successive generations of English jurists (*n*).

277. In any such action, relief is given or withheld on precisely the same principles as in an ordinary action for rescission, of which, indeed, it is, to all intents and purposes, a species, the sole *differentiæ* of the species being that the restitution is necessarily unilateral, and not bilateral, for the simple reason that on the representee's side, nothing having been received or acquired, there is nothing to restore; and also that, though relief

(*k*) The device was of this nature. The shareholder, on discovery of the untruth of the representation whereby he was induced to subscribe for his shares, repudiates his contract, and sues for rescission, which involves the necessity of refusing to pay calls, since such payment would be evidence of affirmation—see Sect. 4, Sub-s. (4), *post*—whereupon, pursuant to the contract between the parties contained in the articles of association, the company purports to forfeit the shares, with the view of doubly entrenching themselves; on the one hand, even if the representee succeeds, they are no worse off by reason of the forfeiture, whilst, if he fails, and seeks to retain the benefits which he acquired under a contract not invalidated by any misrepresentation, they will be in a position to retort upon him that the contract has been determined pursuant to its terms. To meet this manœuvre, it was decided by NEVILLE, J., in *Lamb v. Sambas Rubber and Gutta Percha Co.*, [1908] 1 Ch. 845, and by the C. A. in *Jones v. Pacaya Rubber and Produce Co.*, [1911] 1 K. B. 455, C. A., that, in such circumstances, a plaintiff, on paying the amount of the calls into court and undertaking in damages, is entitled to an interlocutory injunction, so that, if he is unable to establish a case for rescission at the trial, neither his position, nor the company's, is prejudiced: he still holds his shares, and the company have in court, ready to be paid out to them, the amount of the calls and of any damage they may have sustained. See the observations of BUCKLEY, L.J., at pp. 457, 458 of the last cited case.

(*l*) This case is *Ripley v. Paper Bottle Co.* (1887), 57 L. J. (CH.) 327. NEVILLE, J., declined to follow it in the first, and the C. A. expressly overruled it in the second, of the two authorities cited in the last note.

(*m*) In *Flight v. Booth* (1834), 1 Bing. (N. C.) 370, the defendant had put forward no claim on the contract before the arbitrator (see p. 373), and in *Carlisch v. Salt*, [1906] 1 Ch. 335, the defendants had themselves treated the contract as abandoned, and had pulled down the premises the subject of the sale.

(*n*) See Article 36 of the Code. In *Moses v. Macferlan* (1760), 2 Burr. 1005, Lord MANSFIELD, C.J., at p. 1012, says that "this kind of equitable action lies for . . . money got through imposition (implied or express)," amongst other acts, which he enumerates, rendering it *contra æquum et bonum* to retain or withhold from the plaintiff money which has come to the defendant's hands.

is granted on the theory that the contract is voidable, the above circumstances render it unnecessary to ask for a formal decree of rescission (o).

278. Accordingly in every case of money had and received founded on misrepresentation, the representee succeeds where, and only where, he alleges and proves all such matters as are required to be established in an action to set aside a contract. The moneys for the recovery of which this form of proceeding has been successfully resorted to comprise deposits on contracts for the purchase of property (*p*), premiums on insurance policies (*q*), application and allotment moneys or subscriptions for shares in companies (*r*), and the like (*s*). In most of the cases where the action has succeeded, the obtaining by the representor of the money was in fact fraudulent, but it is not essential, any more than it is in actions for rescission, that fraud *at this stage* should be shown (*t*); the "imposition" and "unconscientiousness" mentioned by Lord MANSFIELD as an ingredient in the cause of action applies to the retention of money which it is *contra æquum et bonum* in the representor to withhold, notwithstanding that the acquisition of it might have been not unrighteous, as would be the case where the misrepresentation was innocent (*u*). Where the contract

(o) See *Flight v. Booth, sup.*, per TINDAL, 'C.J., delivering the judgment of the court, at pp. 375, 376, the observations of LINDLEY, J., at p. 294, BRETT, L.J., at pp. 309, 310, and COTTON, L.J., at p. 312, of *Stone v. City and County Bank* (1877), 3 C. P. D. 282, C. A., and *Manners v. Whitehead* (1898), 1 F. 171, as to the identity of the principles to be applied. As to the uselessness of rescission, see *Re Ruby Consolidated Mining Co., Askew's Case* (1874), 9 Ch. App. 664, where, in a case of fully paid shares, the court refused to rectify the register of members, such an order being unnecessary.

(p) *Jones v. Edney* (1812), 3 Campb. 285 (a public house); *Schneider v. Heath* (1813), 3 Campb. 506 (a vessel); *Stevens v. Adamson* (1818), 2 Stark. 422; 20 R. R. 707 (leasehold premises); *Flight v. Booth* (1834), 1 Bing. (N. C.) 370 (the like); *Dobell v. Hutchinson* (1835), 3 A. & E. 355 (the like); *Hutchinson v. Morley* (1839), 7 Scott, 341 (fixtures and fittings); *Thornett v. Haines* (1846), 15 M. & W. 367 (leasehold premises); and *Carlish v. Salt*, [1906] 1 Ch. 335 (freehold property). See also some of the cases of sales by auction which are cited in the notes to Ch. XIII, Sect. 2, *post*.

(q) *Blake v. Albion Life Assurance Co.* (1878), 4 C. P. D. 91; *British Workman's and General Assurance Co. v. Cunliffe* (1902), 18 T. L. R. 502, C. A.; and *Kettlewell v. Refuge Assurance Co.*, [1908] 1 K. B. 545, C. A., "silently" affirmed by the H. L., *sub nom. Refuge Assurance Co. v. Kettlewell*, [1909] A. C. 243, H. L.

(r) *Stone v. City and County Bank, sup.*; and *Re Ruby Consolidated Mining Co., Askew's Case, sup.* (in which it was recognized that the representee would have a remedy, on proof of the facts, in an action for money had and received, and, indeed, that this was his only proper course, the shares having been fully paid, and that relief in the nature of rescission by a summary order under the Companies (Consolidation) Act, 1908 (see the next Sub-section), was out of the question until after the trial of such an action).

(s) In *Duffel v. Wilson* (1808), 1 Campb. 401, the money recovered was a sum paid to insure the representee against being drawn for the militia. In *Blair v. Bromley* (1847), 2 Ph. 354, it was a sum paid for the purpose of being invested in a mortgage. In *Moss & Co. v. Swansea Corporation* (1910), 74 J. P. 351, it was a deposit paid to secure the performance of a contract for the construction of works.

(t) In *Duffel v. Wilson*, *Flight v. Booth*, and *Moss & Co. v. Swansea Corpn., sup.*, the misrepresentation was assumed to have been innocent.

(u) This is the sense in which JESSEL, M.R., thought that, in ordinary cases of rescission, even if fraud is a necessary condition of relief, the condition may be said to be satisfied; it being, in his view, dishonest to seek to *retain*, though it was not dishonest to *obtain*, property and rights acquired by a representation not known to be false at the time of making it. See *Redgrave v. Hurd* (1881), 20 C. D. 1, C. A., at pp. 12, 13.

has been completely executed on both sides, it is more possible to recover money in this form of action than it is to rescind (x).

279. Analogous to the action for money had and received, on the ground of misrepresentation, are those forms of action for the recovery or delivery up of goods or property other than money, on the like ground, which the representor has parted with under the contract, without having received anything in exchange, and, therefore, without having anything to restore (y). Here, too, the only relief required is unilateral restitution, though in this case it is a chattel, whereas in the other it is money, which forms the subject of such restitution; and the principles applicable are accordingly identical.

Sub-sect. (3). Statutory Procedure and Relief in the case of Contracts to take Shares in a Company, where the Company is a going concern.

280. Where it is sought to rescind a contract to take shares in a limited company, within the meaning of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), there are certain statutory provisions affecting, not the substance of the relief, or the conditions on which it is obtainable, but the procedure requisite or available for that purpose. The necessity for these special regulations arises from the enactments prescribing registration of the members.

281. By sect. 25 of the Act a register of members must be kept by every company, containing (*inter alia*) the name, address, and occupation of every member, and entries of the shares held by him with their distinguishing numbers, and of the date at which each person was entered as a member, and, in the case of any person who has ceased to be a member, the date at which he so ceased. By sect. 33 of the Act it is provided that the register "shall be *primâ facie* evidence of any matters by this Act directed or authorized to be inserted therein," amongst which "matters" of course are the particulars prescribed by sect. 25. It follows that, when a shareholder claims to be relieved of his shares on the ground that he was induced to take them by misrepresentation, it is at least desirable and prudent, even if not absolutely necessary, to obtain not merely rescission in the ordinary form, but also, if he can, a judicial direction for the

(x) See § 262, *ante*, as to the rule in actions for rescission. In *Kettlewell v. Refuge Assurance Co.*, [1908] 1 K. B. 545, C. A., affirmed, without giving any reasons, *sub nom. Refuge Assurance Co. v. Kettlewell*, [1909] A. C. 243, H. L., which was an action for the return of premiums, it was held that the contract had not been completely executed on both sides, and that the premiums were consequently recoverable; but the judgments proceeded on the assumption and basis that, if the contract had been shown to have been so executed, the money could no more have been recovered than rescission could have been ordered, in the absence of fraud, as to which exception to the general rule in cases of rescission, see § 263, *ante*.

(y) See *Jones v. Kene* (1841), 2 M. & Rob. 348; 62 R. R. 804 (loan for a life-policy), and *Moorhouse v. Woolfe* (1882), 46 L. T. 374 (where the representee sued a moneylender for delivery up of a bill of sale obtained by misrepresentation, he having repaid the money lent and interest at the rate represented to be the rate habitually charged). See also some of the cases cited in the notes to Sect. 6, Sub-s. (2), *post*.

amendment of the entry in the statutory register which, on rescission, becomes an incorrect entry, but which yet, if not amended, will stand against him as a *prima facie* correct record of the facts, and may thus place obstacles in his way, even whilst the company is a going concern; and, if it should afterwards be wound up, may, as will be seen hereafter (z), constitute an insuperable bar to any relief whatsoever by way of rescission. This direction can only be made if express jurisdiction is conferred upon the courts to grant it. And, as one would expect, such jurisdiction is in terms conferred by sect. 32 of the Act of 1908 (a).

282. It is provided by sub-sect. (1) of this 32nd section that "if the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company, or default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member, the person aggrieved, or any member of the company, or the company, may apply to the court for rectification of the register"; and, by sub-sect. (3) thereof, that "on any application under this section the court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand; and generally may decide any question necessary or expedient to be decided for rectification of the register." Having regard to these two sub-sections, it is obvious that, whatever doubt may have arisen as to its exact extent and limits (b), the jurisdiction is wide enough to include the case of a shareholder complaining that his name was wrongly entered, or wrongly remains, upon the register as a member after the avoidance of his contract with the company on the ground of misrepresentation (c).

283. The jurisdiction is exercisable on the trial of an action in which rectification of the register forms part of the prayer for relief (d), as well as on a summary application under sub-sect. (2) of sect. 32. The term "application to the Court" is plainly general enough to comprise any application, however and whenever made, notwithstanding that the enactment is expressly and immediately directed to the authorization, if not encouragement, of the *brevi manu* form of proceeding set forth in sub-sect. (2), namely, an originating motion or summons, without recourse to an action (e).

(z) See Sect. 4, Sub-s. (6), *post*.

(a) This section is, with omissions of matters rendered unnecessary by other legislation, and with the addition of one provision, a reproduction *totidem verbis* of sect. 35 of the Companies Act, 1862 (25 & 26 Vict. c. 89). The decisions on the repealed, and reproduced, section are therefore still relevant.

(b) Some difference of opinion on this head appears in the judgments of TURNER, L.J., on the one hand, and CAIRNS, L.J., on the other, at pp. 435-437, and 440-442, respectively, of *Re London Hambrugh and Continental Exchange Bank, Ward and Henry's Case* (1867), 2 Ch. App. 431.

(c) See the cases cited in note (f), *inf*.

(d) See the authorities referred to in note (u) to § 273, *ante*.

(e) Sub-s. (2) of sect. 32 provides that "the application may be made, as respects

284. The relief by way of rectification of the register on a statutory application, being a form, or a consequence, of rescission, is granted or withheld on the same principles as rescission of any other contract in an action for that purpose, as is apparent from the nature of the evidence which has been held necessary and sufficient to establish the applicant's right to an order in all the cases in which the summary jurisdiction has been successfully invoked (*f*).

285. Though there is abundant jurisdiction to entertain an originating motion or summons to rectify the register on the ground of misrepresentation, it is within the discretion of the court whether, in the particular case, the circumstances render it expedient to do so or not. In the exercise of this discretion, the courts have from the first discouraged applications which are likely to involve complicated questions of title (*g*), or a serious conflict of evidence and a protracted inquiry (*h*), or where, the shares being fully paid up, the applicant's object can be more conveniently achieved by an action for money had and received (*i*); but, on the other hand, they have encouraged the summary procedure where "the question is a very short and narrow one," and there are "no complicated equities" (*k*), and, *a fortiori*, where there is no resistance or disputed issue at all (*l*). The consequence of the views thus expressed is that a serious case of misrepresentation inducing a subscription for shares is rarely at the present day tried on motion under the section, still less on summons (*m*), but is

companies registered in England or Ireland, by motion in the High Court, or by application to a judge of the High Court sitting in chambers, or by application to the judge of the court exercising the Stannaries Jurisdiction in the case of companies subject to that jurisdiction, and, as respects companies registered in Scotland, by summary petition to the Court of Session, or in such other manner as the said courts may respectively direct." It was said by CHITTY, J., in *Duffin v. Mexican Co.*, [1890] W. N. 116, that the application should, as a rule, be made by motion, rather than by summons. As to the courts severally exercising the jurisdiction, see Ch. XV, Sect. 1, *post*.

(*f*) Such as *Re Scottish Petroleum Co.*, *Anderson's Case* (1881), 17 C. D. 373, *Re London and Staffordshire Fire Insurance Co.*, *Wallace's Case* (1883), 24 C. D. 149, *Re London and Provincial Electric Lighting and Power Co.*, *Ex parte Hale* (1887), 55 L. T. 670, *Re Mount Morgan (West) Gold Mine, Ltd.*, *Ex parte West* (1887), 56 L. T. 622, and *Re Metropolitan Coal Consumers' Association*, *Wainwright's Case* (1890), 63 L. T. 429, C. A. These were all cases where the company was a going concern: for examples of rectification of the register on motion when the company is in liquidation, see § 289, *post*, and note (*b*) thereto.

(*g*) *Re Russian (Vyksounsky) Ironworks Co.*, *Stewart's Case* (1866), 1 Ch. App. 574, *per* TURNER, L.J., at pp. 585, 586.

(*h*) *Re British Burmah Lead Co.*, *Vicker's Case* (1887), 56 L. T. 815, where, though he did not refuse to entertain the motion, KAY, J., protested energetically against the growing practice of resorting to the statutory procedure, instead of an action, in cases which involved a hearing of lengthy evidence by sections, at weekly intervals, on fragments of motion days; and *Sleigh v. Transvaal Options, Ltd.* (1904), 6 F. 420, where the Court of Session, on similar grounds, expressed the view that the statutory petition was not a convenient form of proceeding for cases of intricacy and detail (see pp. 425, 426). Cp. *Re British Sugar Refining Co.* (1857), 3 K. & J. 408, *per* WOOD, V.-C., under the similar section of the Act of 1856.

(*i*) As in *Re Ruby Consolidated Mining Co.*, *Askew's Case* (1874), 9 Ch. App. 664.

(*k*) *Gowans v. Dundee Steam Navigation Co.* (1904), 6 F. 613.

(*l*) *Re London Electrobros Co.* (1906), 22 T. L. R. 677.

(*m*) See *Duffin v. Mexican Co.*, [1890] W. N. 116.

ordinarily made by the representee the subject of an action for rescission, and (as relief consequential thereon) rectification of the register.

286. The nature of the statutory remedy is stated at the end of sub-sect. (2) of the section in question: "the court may . . . order rectification of the register, and payment by the company of any damages sustained by any party aggrieved." The order for rectification under very special circumstances, as, for instance, where the company makes no resistance, and has actually returned the deposits to several of the shareholders, may be made *ex parte*, on the terms that it is to lie in the office for a stated period, with notice to be given to the company that they have liberty to apply in the meantime (*n*). The court may fix a date at which the rectified registration shall become operative, and (if no rights of third parties are affected) may even make it retrospective (*o*). The order, if made, must comprise a direction that notice of the rectification be given to the registrar of companies, in any case in which the company concerned is required by the Act of 1908 to send a list of the members to such registrar (*p*). The "damages" referred to in the sub-section are obviously not to be understood in the technical sense (for, so understood, the expression presupposes an adherence to the contract, and not an avoidance of it), but as comprising only such restitution of moneys paid on application or allotment of shares, or pursuant to calls, together with interest (*q*), as would form part of the relief consequential upon an order for rescission to which a representee would be entitled in an action for that purpose (*r*). There is no jurisdiction to include in the damages the representee's costs as between solicitor and client, or the difference between such costs and costs as between party and party (*s*); but there is jurisdiction to award solicitor and client costs, as such, under sect. 5 of the Judicature Act, 1890, which gives

(*n*) This course was adopted in *Re London Electrobus Co., sup.*, where the application was made by 1026 shareholders, whose names were scheduled to the notice of motion.

(*o*) *Re Sussex Brick Co.*, [1904] 1 Ch. 589, (C. A. (at pp. 607, 608, 610)).

(*p*) This is Sub-s. (4) of sect. 32 of the Act.

(*q*) See (for instances of orders for repayment with interest) *Re Metropolitan Coal Consumers Association, Ex parte Edwards* (1891), 64 L. T. 561, and *Re Metropolitan, etc. Co., Karberg's Case*, [1892] 3 Ch. 1, (C. A., where the interest ordered to be paid was at the rate of 4 per cent., and *Re Mount Morgan (West) Gold Mine, Ltd., Ex parte West, sup.*, where the rate was 5 per cent. (p. 625)).

(*r*) See *Re Railway Time Tables Publishing Co.* (1889), 42 C. D. 98, where at pp. 108, 109, STIRLING, J., explains that "damages" are to be understood in a "broad and popular," and not in the technical sense, and, in that case, meant no more than "what was paid on the shares"; and *Re Metropolitan Coal Consumers Association, Karberg's Case, sup.*, at p. 17, where the interest was expressly stated to be in the nature of restitution, and not damages in the technical sense. It is on this theory that damages cannot be given when no order is made for rectification: *Re Otto's Kopje Mines, Ltd.*, [1893] 1 Ch. 618, 624, 625, 627, (C. A.).

(*s*) This course was taken in *Re New Quebrada Co., Pontifex's Case* (1867), 36 L. J. (Ct.) 903, and also in *Re Scottish Petroleum Co., Anderson's Case* (1881), 17 C. D. 373 (see the minute of the order at p. 378), but the practice of giving, in the form of damages, the difference between the two scales of costs, where there are no judicial grounds for making the order directly, was condemned by JESSEL, M.R., at p. 459 of *Cockburn v. Edwards* (1881), 18 C. D. 449, as wholly inadmissible in any form of action or proceeding.

general power to the Supreme Court to deal with "the costs of all proceedings." The repealed section of the Act of 1862 conferred express authority in this behalf, but this provision, having been rendered unnecessary by the enactment referred to, has been omitted from the corresponding section of the Act of 1908; and for a similar reason, the jurisdiction to direct an issue as to any question of fact, which was provided for by the earlier section, has also disappeared (*t*).

Sub-sect. (4). The like Statutory Procedure and Relief where the Company is in Liquidation.

287. If the company goes into liquidation at a time when the representee's name is on the register of members, this fact, as will be seen hereafter when the various affirmative defences to a case of rescission come to be discussed, constitutes *per se* a bar to relief of this character, unless certain conditions have been satisfied by the representee (*u*). Where these conditions are satisfied, and the representee is in a position to proceed with his claim to be relieved of his shares, or rather of his liability as a contributory in respect thereof, he can only do so by a summons in the winding up, claiming that the list of contributories be varied by omitting his name therefrom, and that the necessary rectification be made in the register of members.

288. The above procedure is regulated by the relevant provisions of the Companies (Consolidation) Act, 1908, and the Companies (Winding Up) Rules, 1909, framed thereunder. On liquidation, there is no longer any company, except in name, or any shareholders, but only a body of contributories. The statutory provisions regulating the rights and liabilities of these contributories, both as against creditors, and *inter se*, are contained in sects. 123-128 and sects. 163-173 of the Act, and these provisions, except where otherwise stated, equally apply, whether the winding up be by the court, or voluntary, or subject to the supervision of the court (sect. 122). "The term contributory means every person liable to contribute to the assets of the company in the event of its being wound up, and, in all proceedings for determining, and in all proceedings prior to the final determination of, the persons who are to be deemed contributories, includes any person alleged to be a contributory" (sect. 124). The persons so "liable" are "present" and "past members," and the pecuniary extent of their liability is measured by the amount required for the payment of the company's "debts and liabilities and the costs, charges, and expenses of the winding up, and for the adjustment of the rights of the contributories among themselves" [sect. 123 (1)]; but in no case can any such person be held liable for any sum in excess of the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member [sect. 123 (1), (iv)]. A "past member" is a person who ceased to be a member

(*t*) Because Orders 33 and 34 of the R. S. C. fully provide for these matters.

(*u*) Sect. 4, Sub-s. (6), *post*.

within the year immediately preceding the commencement of the winding up [sect. 123 (1), (i)], and he is only to be called upon to contribute if it appears to the court that the present members are unable to satisfy the contributions above mentioned [sect. 123 (1), (iii)]. By sect. 163 (which is a reproduction of sect. 98 of the Companies Act, 1862), it is provided that "as soon as may be, after making a winding-up order, the court shall settle a list of contributories, with power to rectify the register of members in all cases where rectification is required in pursuance of this Act." The list is settled by the liquidator of the company, as the officer of the court (*x*), and consists, in the first instance, of the present members only, commonly called List A, to which at a later date, if it appears to the court necessary, but not otherwise, a List B of past members may be added. Notice is to be given to all persons proposed to be included in the list, of the time and place appointed for the settlement, and, after hearing any objections on the part of any such person, the liquidator at that time and place is to finally settle the list, and thereupon give notice to every person finally placed thereon, with an intimation that he is at liberty, within twenty-one days, to apply to the court by summons for the removal of his name therefrom, or for a variation thereof (*y*). It is at this point that the alleged contributory, unless, on the hearing of his objection, he has already persuaded the liquidator to vary the provisional list by striking his name out, must bestir himself, for unless he applies to the court in the prescribed manner and within the prescribed time, a call will inevitably be made upon him, followed by a "balance order," which will be conclusive (*z*). If, therefore, having taken the proper steps, he is in a position, notwithstanding the winding up, to assert his claim to relief on the ground that he was induced by misrepresentation to take the shares in respect of which he is sought to be fixed as a contributory, he must do so by initiating the proceedings authorized by the statute and rules, for no otherwise can he get rid of the effect of the two statutory documents which will otherwise conclude him, viz. the register of members, and also the finally settled list of contributories, whether it be List A or List B.

289. The matters to be established on such application are precisely the same as in any case where the company is a going concern and the application is for the rectification of the register simply, which, again as has been seen, are identical with the *alleganda et probanda* in an ordinary action of rescission (*a*). Where all such *alleganda et probanda* are established, the order for variation of the list by removing the representee's name, and for rectification of the register, is made (*b*); where the applicant's

(*x*) See rr. 75 (1) of the Companies (Winding Up) Rules, 1909.

(*y*) See rr. 77-82 of the same.

(*z*) See rr. 83-87 of the same.

(*a*) See Sub-s. (3), *sup*.

(*b*) As in the following cases: *Re Deposit and General Life Assurance Co., Ex parte Ayre* (1858), 27 L. J. (Ch.) 579 (under a corresponding section of the Joint Stock Companies Act, 1856); *Re Life Association of England, Blake's Case* (1865), 34 Beav. 639; *Re Warren's Blacking Co., Pentelow's Case* (1869), 4 Ch. App. 178; *Re Estates Investment Co., Pawle's Case* (1869), 4 Ch. App. 497; *Reese River Silver Mining Co. v. Smith*

proof falls short in any respect of what is so required, the application fails (c).

290. As to the nature and extent of the statutory relief, there is jurisdiction to rectify the register of members after the winding up, both for the purpose of, and as auxiliary to, the settling or variation of the list of contributories (d), and also where the rectification is not required for that purpose (e); and the court has the same power to fix a date from which the rectified entry is to take effect, and even to make a retrospective order (if no *jus tertii* is interfered with), as it has when the company is not in liquidation (f). The only differences between the remedies granted in the winding up, and those granted when the company is a going concern, are that (1) in the former case, the list of contributories will be varied where the applicant requires it (which ordinarily he does), as well as the register of members rectified; (2) in the former case, the only means of obtaining any relief at all is by the statutory procedure, whereas in the latter, it is alternative to an ordinary action for rescission; and (3) in the former case, any order for the repayment of moneys paid by the representee in respect of his shares, with or without interest, though enforceable in the winding up (since such moneys and interest are not to be regarded as unliquidated damages in the ordinary sense, but as an equitable debt), can only be the subject of a proof, on which a dividend may be received, and cannot, as in the latter case, be enforced by the ordinary procedure (g).

291. In some cases it is not the alleged contributory, but the liquidator, who has reason to complain of an incorrect entry in the register of members on the ground of misrepresentation. Thus, where the directors of a company, having power by the articles to approve or refuse registration of transfers of shares, have been induced by the misrepresentation of the

(1869), L. R. 4 H. L. 64; *Re London and Mediterranean Bank, Wright's Case*, No. 1 (1871), L. R. 12 Eq. 334 n. (where the applicant obtained an order for the removal of his name from List A); *Re Same, Wright's Case*, No. 2 (1871), 7 Ch. App. 55 (where the same applicant, on the same grounds, got his name removed from List B also, on which the liquidator had placed it after his failure to keep it on List A, as above); *Re Etna Insurance Co., Slattery's Case* (1873), Ir. R. 7 Eq. 245; *Re Same, Ex parte Shicks* (1873), Ir. R. 7 Eq. 264; and *Re General Railway Syndicate, Whiteley's Case* [1900] 1 Ch. 365, C. A. All the above, except the first, were decided under sect. 98 of the Act of 1862.

(c) As, for instance, in *Re Madrid Bank, Wilkinson's Case* (1867), 2 Ch. App. 536, and *Re London and Provincial Starch Co., Gowers' Case* (1868), L. R. 6 Eq. 77. No reference of course is here made to the far more common type of case, where the failure of the application was due to the representee's not having taken the necessary steps to remove the bar created by the mere intervention of the winding up, as to which see Sect. 4, Sub-s. (6), *post*.

(d) *Reese River Silver Mining Co. v. Smith, sup., per Lord HATHERLEY*, L.C., at pp. 75, 76, and Lord CAIRNS at p. 80.

(e) *Re Scottish Universal Finance Bank, Breckenridge's Case* (1865), 2 H. & M. 642, and *Re Sussex Brick Co.*, [1904] 1 Ch. 598, 605, 607, 609, C. A.

(f) *Re Joint Stock Discount Co., Nation's Case* (1866), L. R. 3 Eq. 77; *Reese River Silver Mining Co. v. Smith, sup., per Lord CAIRNS* at p. 80; and *Re Sussex Brick Co., ubi sup.*

(g) *Re London and Provincial Electric Lighting and Power Co., Ex parte Hale* (1887), 55 L. T. 670.

transferor, or the transferee, or both, to pass any such transfer, the liquidator may resort to the statutory procedure for the purpose of putting the transferor's name on, and striking the transferee's name off, the register of members and the list of contributories. The kind of statements which are deemed material for this purpose are misdescriptions of the circumstances and position in life of the transferee, and of the amount, nature, or reality of the consideration supposed to have been given by him to the transferor (*h*). "The principle is that the transferor cannot escape liability if he has actively by falsehood, or passively by concealment, induced the directors to pass and register a transfer (even though it be an out-and-out transfer) which, if he had not so deceived or concealed, they would have refused to register" (*i*). The application in such cases can only be made in the name of the company, and by leave of the court, and there is jurisdiction to order the transferor to pay the costs of the proceedings (*k*).

Sub-sect. (5). Relief in cases of Sales by Order of the Court.

292. Where property is sold under the direction of the court, in the course of administering a trust, partnership, or insolvent estate, or in any other cause or matter, any person who has been induced by misrepresentation to enter into a contract to purchase such property is entitled to come to the court in that cause or matter, and apply to be discharged from his purchase; and an order will be made for that purpose on proof of the facts which it would be necessary to establish in an ordinary action for rescission, and subject in all respects to the same principles and conditions (*l*).

(*h*) Instances of successful applications by the liquidator, on the ground of such misrepresentations are: *Re Bank of Hindustan, China, and Japan, Ex parte Kintrea* (1869), 5 Ch. App. 95, 100, 101, (where no money passed at all, and the alleged consideration was merely colourable); *Re Same, Snow's Case* (1871), 25 L. T. 406 (*per* WICKENS, V.-C., where the consideration was stated to be £1326 expressed to be then paid, whereas nothing happened but the handing over of a promissory note for that amount which both transferor and transferee knew to be worthless, and where, further, the transferee's financial position was misstated); *Re Imperial Mercantile and Credit Association, Payne's Case* (1869), L. R. 9 Eq. 223, where JAMES, V.-C., followed his own previous decision in the same liquidation in *Williams' Case* (1869), *ibid.*, p. 225 *u.* (misdescription of transferee's position in life, and misstatement of pretended consideration); and *Re Discoverers Finance Corporation, Lindlar's Case*, [1910] 1 Ch. 312, C. A. In *Re Wheel Unity Wood Mining Co., Chynoweth's Case* (1880), 15 C. D. 13, C. A., the liquidator's application would have succeeded, on the like grounds, but for the fact that the cost-book mining company had made calls on the transferee, forfeited his shares, and sued him to judgment, and had thereby affirmed the transaction, and estopped themselves and the liquidator from disputing its validity. On the other hand, in *Re European Bank, Masters' Case* (1872), 7 Ch. App. 292 (*per* JAMES and MELLISH, LL.JJ., reversing MALINS, V.-C.), and *Re Humber Ironworks and Shipbuilding Co., Williams' Case* (1875), 1 C. D. 576 (*per* JESSEL, M.R.), the misrepresentation of the transferee as a "gentleman" (the other circumstances of the case pointing to complete *bona fides*), was deemed immaterial, and the liquidator failed. See, generally, the decisions in the European Arbitration which are collected in note (*x*) at p. 38 of Buckley on *Companies* (9th edit.).

(*i*) *Re Discoverers Finance Corpn., Lindlar's case, sup.*, at p. 321.

(*k*) *Re Bank of Hindustan, etc., Ex parte Kintrea, sup.*, *per* GIFFARD, L.J., at p. 102.

(*l*) Such orders were made at the instance of the purchaser in *Martin v. Cooper* (1846), 3 Jo. & Lat. 496, 72 R. R. 100; *Lachlan v. Reynolds* (1853), Kay 52; *Brandling*

293. The fact that the sale is, in a sense, by the court, and that the misrepresentation, if any, is made by the officers of the court, does not in the slightest degree weaken the purchaser's title to relief, or diminish the vendor's liability to submit to it (*m*). Indeed, this circumstance renders the contract, if anything, more readily impeachable than if the sale had no judicial sanction or authority. "The court," said Lord St. LEONARDS (*n*), "expects from vendors, and particularly from officers of the court, a clear and express statement"; for, in the language of PAGE-WOOD, V.-C. (*o*), "it would be strange indeed if in sales made by the direction of the court this rule" (sc. the rule of good faith) "should be less stringent." In such cases there should be, as was observed by JESSEL, M.R., "at least as much good faith shown towards the purchaser as, and perhaps a little more than, is required by ordinary vendors out of court" (*p*): it is the clear duty of the court to see that its ministers are at least as honest as other people, and the no less clear right of a purchaser to rely with absolute confidence on the discharge of this judicial duty (*q*).

Sub-sect. (6). Physical Resumption or Recapture of Property parted with under a Contract voidable for Misrepresentation.

294. There are certain cases in which the representee, without invoking the aid of any judicial tribunal to annul the contract, may obtain rescission, or rather the fruits of rescission and all the practical advantages which he could derive from it, by taking the law into his own hands, just as (for instance) a person injured by a nuisance may abate it *propria manu*, instead of resorting to the court for an injunction or damages. Where goods and chattels, the possession of which is capable of passing by manual delivery, have been parted with pursuant to a contract voidable for misrepresentation, the representee, if fortunate enough to discover them afterwards, whether in the hands of the representor, or of his trustee in bankruptcy, or other third person, may lawfully revindicate or "resume" the property in such goods and chattels by physical recapture; and this summary method of enforcing the rule *je prends mes biens ou je les trouve* operates as an implied, but a most effectual and emphatic, election to avoid the contract (*r*). Of course there must be no incidental violence or trespass,

v. *Plummer* (1854), 2 Drew. 427 (here the petition was for compensation); *Whittemore v. Whittemore* (1869), L. R. 8 Eq. 603; *Re Banister, Broad v. Munton* (1879), 12 C. D. 131, C. A.; *Re Arnold, Arnold v. Arnold* (1880), 14 C. D. 270, C. A.; and *Mahomed Kala Mea v. A. V. Harperink* (1908), 25 T. L. R. 180, P. C.

(*m*) In the Roman law of sale, it was otherwise: see App. C., Sect. 2, Sub-s. (10).

(*n*) When Sir Edw. Sugden, and L. C. of Ireland, in *Martin v. Cooper, sup.*, at p. 505.

(*o*) At p. 55 of *Lachlan v. Reynolds, sup.*

(*p*) At p. 141 of *Re Banister, sup.*; with which compare his observations to the same effect at pp. 273, 274, 277 of *Re Arnold, sup.*, and those of BYRNE, J., at the commencement of his judgment in *Debenham v. Sawbridge*, [1901] 2 Ch. 98.

(*q*) See the very strong observations of the Privy Council on the conduct of the Indian court in *Mahomed Kala Mea v. A. V. Harperink, sup.*

(*r*) This was the course successfully adopted by the representee in, amongst other

and the *fortiter in re* must be characterized by the *suaviter in modo* (s); further, if there is anything which under a judgment for rescission would have to be restored to the representor as part of the mutual restitution which is a condition of the relief, such restoration must be made or offered by the representee when "resuming" the possession of, and property in, the chattels in question (t); or, if the article is found in the hands of a third party who has acquired it, or has the possession or custody of it, in good faith and for value, payment must be made or tendered by the representee of what has been paid by such third party in so acquiring it, or what has been advanced by him on the security of it, or the amount of his proper charges for warehousing and the like (u), as the case may be. Where there is nothing to restore to the representor or pay to a third party, or where the contract is not voidable but void (x), so that no property ever passed at all, the representee's right is unconditional. In any case, like any other person who takes the law into his own hands, and assumes it to be in his favour without obtaining a judicial declaration to that effect, the representee accepts the risk (slight or serious, according to all the circumstances) of his acts turning out to be unjustified.

cases, *Clough v. London and North Western Railway Co.* (1871), L. R. 7 Exch. 26, Exch. Ch., where the goods were obtained by the London Pianoforte Company (who were the representees, and the real defendants to the action) from the defendant railway company, on agreeing to indemnify them (see pp. 34, 37, where the right of any representee to "resume the property which he parted with under" the contract is discussed); *Re Eastgate, Ex parte Ward*, [1905] 1 K. B. 645, where the swindled creditors of the representor, after the act of bankruptcy but before the receiving order was made, broke into the house of the debtor and recaptured the goods which they had been induced to part with by the debtor's implied false pretence of his intention to pay for them, and BIGHAM, J., held that they were entitled to disaffirm the contract by this somewhat lively procedure as against the representor's trustee in bankruptcy; and *Tilley v. Bowman*, [1910] 1 K. B. 745, 750, where the circumstances were the same, except that in this case the "recapture" was subsequent to, not only the act of bankruptcy but the receiving order also, which fact, however, was considered by HAMILTON, J., not to affect the application of the rule.

(s) In *Re Eastgate, sup.*, BIGHAM, J. (p. 467), expressed his disapproval of the manner in which the "resumption" was effected, but did not consider it serious enough to affect his decision.

(t) See *Clough v. L. & N. W. Railway Co., sup., per Cur.* at p. 37: "No man can at once treat the contract as avoided by him, so as to resume the property which he parted with under it, and at the same time keep the money or other advantages which he obtained under it; and therefore the London Pianoforte Company were bound to restore to Adams the money and the acceptance which they had obtained from him." Here the above company were the representees, and Adams was the representor, but the non-payment of these moneys to Adams was immaterial, since Adams was the only person who could assert a right to such payment, and he (for very good reasons) was not suing.

(u) In *Tilley v. Bowman, sup.*, the representee paid the pawnbroker the money advanced, with the interest chargeable, and so obtained possession of the goods, his right to retain which was established in the action, together with his right to be recouped by the representor the moneys so paid by way of set-off in the representor's bankruptcy.

(x) See Sect. 2, Sub-s. (2), *ante*.

SECT. 4. AFFIRMATIVE DEFENCES TO PROCEEDINGS FOR
RESCISSION.

295. Apart from the affirmative defences which are available in the case of actions in general for the rescission of contracts, whether on statutory (*y*) or non-statutory (*z*) grounds, there are certain affirmative pleas or answers, which are special to actions or other proceedings instituted for the purpose of avoiding a contract or transaction on the ground of misrepresentation (*a*), and which it is proposed to consider separately and successively (*b*). The burden of allegation and proof, in the case of each of these, is (as the name "affirmative defence" imports) on the representor who affirms (*c*), and not on the representee who denies; though that burden may be discharged, in whole or in part, by the representee's admissions at or before the trial or hearing, whether express or implied (*d*), or may, in the course of the proceedings, be shifted from the shoulders of the representor on to those of the representee (*e*).

Sub-sect. (1). The Representee's Knowledge of the Truth.

296. If, when the representation was made, the representee knew the whole truth as to all the material facts, he was never deceived or misled, and he is, therefore, debarred from all relief by way of rescission, as much as he is from all relief by way of compensation or damages (*f*).

Sub-sect. (2). Agreement by the Representee to waive Inquiry, dispense with Information, or take with all Risks, Faults, or Defects, etc.

297. Where the representee either expressly, in virtue of a term in the contract, or impliedly by his acts and conduct, has undertaken or agreed

(*y*) Such as the various Statutes of Limitation, as to which see the treatises on the Limitation of Actions, and the authorities collected therein, and, particularly, as to when the statutory period begins to run in cases of fraudulent misrepresentation, *Blair v. Bromley* (1847), 2 Ph. 354 (*per* Lord COTTENHAM, L.C., at p. 350), *Thorne v. Heard and Marsh*, [1895] A. C. 495, H. L. (*per* Lord HERSCHELL, L.C., at p. 503, and Lord DAVEY at p. 506), and *Re McCallum* (1901), 83 L. T. 717, C. A.

(*z*) Such as release, estoppel, and the like, as to which see the various treatises on the law of contracts in general, estoppel, etc.

(*a*) These are the subject of Article 39 of the Code.

(*b*) In the first six Sub-sections of this Section.

(*c*) See the observation of the Privy Council at p. 241 of *Lindsay Petroleum Co. v. Hurd* (1874), L. R. 5 P. C. 221, and those of Lord DAVEY at p. 295 of *Aaron's Reefs, Ltd. v. Twiss*, [1896] A. C. 273, and generally, the cases cited in the notes to this Section, and also (as regards the two defences of knowledge, and waiver) in the notes to Ch. X, Sect. 2, Sub-ss. (1) and (2).

(*d*) Admissions may be implied from non-denials in a pleading, or from the very form and title of the proceeding, as (*e.g.*) where an application is made in the winding up of a company, and the very title of the motion, "*Re the X. Co.*," admits the *prima facie* right of the representor to set up the liquidation as a bar to rescission.

(*e*) Illustrations of this tossing to and fro of the onus of proof will be found in the case of the defences dealt with in Sub-sections (2), (3), (5), and (6), *post*.

(*f*) See Ch. X, Sect. 2, Sub-s. (1), *ante*, which deals with this plea as one which is common to both of the two remedies for misrepresentation—damages and rescission.

to dispense with information, or not to rely upon it, or to accept the property or rights purporting to be conveyed or transferred by the contract "with all faults," or with all defects of title, or "at all risks," he cannot be heard to complain of misrepresentation in any proceedings for rescission, any more than he can be heard to so complain in an action for damages (*g*).

Sub-sect. (3). Agreement by Representee to waive Rescission and accept Compensation instead.

298. If the representor can show that the representee, without having made any such agreement as is the subject of the last-mentioned class of plea, has nevertheless undertaken not to insist on rescission, but to accept pecuniary compensation in lieu of it, it is obvious that he has, *prima facie* at all events, a valid defence to any proceedings founded on misrepresentation in so far as it is sought thereby to obtain an annulment of the contract, but no further or otherwise. Here, of course, in contrast with the type of defence referred to in Sub-sect. (2), where the agreement may be implied from acts and conduct as well as expressed in terms, the undertaking relied upon must be found, if at all, in the contract itself; it must be "so nominated in the bond"; that is to say, the representee must be in a position to point to some clause or condition of the contract in which the renunciation of this particular form of relief is clearly declared. The question usually arises in contracts for the sale of land, a common condition of which is that the sale shall not be vitiated or annulled for any error or omission in the particulars of sale, but shall be the subject only of compensation, or allowance, in money (*h*). Where such a condition forms part of the bargain of the parties, the representor is entitled to succeed (*i*), unless the representee on whom the burden of proof thereupon rests, can bring the case within one or other of the two recognized exceptions to the rule.

299. These two exceptions are the outcome of the principles of interpretation applied by the courts in relation to claims and conditions of the character in question. It has been found necessary to put some reasonable limitation upon the generality of the expressions "error," "mistake," "omissions," "misdescription," "misstatement," "defect in title," etc. In the first place, a deliberate and fraudulent misrepresentation has been

(*g*) See Ch. X, Sect. 2, Sub-s. (2), *ante*, which similarly deals with this defence in its twofold application to both forms of proceeding.

(*h*) There is considerable variety in the precise language employed in the various cases, but this is the substance common to them all. As to the form of condition providing that there shall be neither rescission nor compensation see § 300, *inf*.

(*i*) In the following cases the plea prevailed: *Leslie v. Thompson* (1851), 9 Hare, 268; *Whittemore v. Whittemore* (1869), L. R. 8 Eq. 603, 605, 606; *Re Terry and White's Contract* (1886), 32 C. D. 14, C. A.; *Re Fawcett and Holmes* (1889), 42 C. D. 150, C. A. (where the representor suing for specific performance set up the condition to defeat a plea of misrepresentation); *Debenham v. Sawbridge*, [1901] 2 Ch. 98; *Re Simpson and Thomas Moy, Ltd.* (1909), 53 Sol. J. 376; and *Shepherd v. Croft*, [1911] 1 Ch. 521.

held not to come within the class of "errors" or "mistakes" or "omissions" intended by such a term in the contract, that class being meant to comprise only such misstatements as are innocent and accidental. Secondly, *error in substantialibus*, or a misrepresentation as to the essence, character, or substance of the subject-matter of the contract, is not deemed to be covered by any of the above expressions (*k*). The rule is best stated by the Court of Common Pleas, in a case which has always been regarded as the foundation of the law on this topic, as follows: "where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation" (*l*). This does not, however, mean that such conditions are necessarily taken to refer only to errors which are trifling and trivial in mere point of quantity or figures (*m*). Where there is a "misdescription in a material or substantial point" of any sort, the plea fails, though the difference in value is difficult to assess or insignificant (*n*). Conversely, where it is a question of compensation only, the question of difference in character is immaterial (*o*). In accordance with the above principles, the defence has always been defeated and rescission has been granted notwithstanding the condition, whenever fraud has been established (*p*), or where the thing tendered in discharge of the contract was shown to materially differ in quality, or substance, or title, from that which it had been represented to be (*q*).

(*k*) See, for both exceptions, the judgment of the Court of C. P. at pp. 376 (as to fraud), and 377 (as to misrepresentation of the substance), in *Flight v. Booth* (1834), 1 Bing. N. C. 370; also the observations of Lord ESHER, M.R., at p. 22, and LINDLEY, L.J., at pp. 28-30, of *Re Terry and White's Contract*, *sup.*; and those of BYRNE, J., at p. 109 of *Debenham v. Sawbridge*, *sup.*

(*l*) *Flight v. Booth*, *sup.*, at p. 377.

(*m*) *Re Terry and White's Contract*, *sup.*, per LINDLEY, L.J., at p. 28; *Re Fawcett and Holmes*, *sup.*, per Lord ESHER, M.R., at p. 156; and *Jacobs v. Revell*, [1900] 2 Ch. 858, per BUCKLEY, J., at p. 865.

(*n*) See *Flight v. Booth*, *sup.*, at pp. 378, 399; and *Madeley v. Booth*, cited in note (*q*), *inf.*

(*o*) *White v. Cudden* (1842), 8 Cl. & Fin. 766 (where the misdescription of the fines payable by the custom of the manor was deemed to affect the whole substance of the contract sufficiently to entitle the representee to rescission, if that remedy had been asked for, but, compensation being the only subject of the suit, and such compensation being incapable of estimation, the representee failed, the substantiality of the misdescription being irrelevant to that question: per BROUGHAM, L.C., at p. 786, and Lord COTTENHAM, at pp. 792-794); *Re Leyland and Taylor's Contract*, [1900] 2 Ch. 625, 630; and *Shepherd v. Croft*, *sup.*, at p. 529.

(*p*) As in *Dimmock v. Hallett* (1866), 2 Ch. App. 21.

(*q*) As in *Stanton v. Tattersall* (1853), 1 Sm. & G. 529, where the property was described as "No. 58, on the north side of Pall Mall, opposite to Marlborough House," with an access (described) to No. 57, whereas in fact it was not in Pall Mall at all, and had no such access, and where, therefore, STUART, V.-C., refused to give effect to the plea, holding that "what is presented to the purchaser as the subject-matter of his contract is something so different from what must be understood by the description in the particulars of sale" (p. 536) that the condition became inapplicable. Similarly, in cases where the representee claims the return of his deposit, which are decided on precisely the same principles as cases of rescission—see pp. 375, 376 of *Flight v. Booth*,

300. A form of condition is occasionally used in which it is stipulated that any error or omission or misdescription shall neither vitiate the sale, *nor be a ground for compensation (r)*. To any such case the same rule, and the same exceptions, apply, *mutatis mutandis*. That is to say, where the case is within the rule, and not within either of the exceptions, the condition is a bar to *any* form of relief (s), though it has been observed that "it is

sup., and Sect. 3, Sub-s. (2) of this Chapter, *ante*—the relief prayed is granted, notwithstanding the condition, where there is *error in substantialibus*, as was the case in *Flight v. Booth, sup.* (where a property was described as one in which no offensive trade, nor either of two specified trades, could be carried on—leaving it to be inferred that any inoffensive trade, other than the two specified, was permissible; whereas in fact the tenant could be ejected by the superior landlord if he exercised any of a large number of such other inoffensive trades: see pp. 377, 378); *Dobell v. Hutchinson* (1835), 3 A. & E. 355 (tenancy from year to year misrepresented as a twenty-three years' lease, and the property incorrectly stated to comprise a certain yard); and *Madeley v. Booth* (1849), 2 De G. & Sm. 718, a very strong case, in which KNIGHT-BRUCE, V.-C., held that the difference between the residue of a term, as the interest was described, and an underlease for such residue, less three days, as in fact it was, notwithstanding that most people would consider the latter had positive advantages over the former, by reason of the absence of liability to the head-landlord, and notwithstanding that the difference in value had been assessed by an arbitrator at the nominal figure of 5s., was sufficiently vital to justify a disregard of the condition, and a decision that the representor, who was suing the representee for specific performance, not only failed in his suit, but was bound to return the deposit to the representee on the agreement being delivered up by him to be cancelled); *Re Davis and Cavey* (1888), 40 C. D. 601 (where there was a condition that no objection should be taken in respect of anything contained in the original lease, but, the premises being sold as leasehold *business* premises, it was held by STIRLING, J.—see pp. 608, 609—that the representee could not be forced to take premises which turned out to be subject to covenants in the original lease restraining the carrying on thereat of various specified businesses, including that of the representee; that the condition had no application, and afforded no answer; and that the representee was entitled to have his deposit repaid to him, though there was no jurisdiction to order such repayment then and there, having regard to the form of proceeding which had been adopted, viz. a summons under the Vendor and Purchaser Act, 1874, as to which see Ch. XV, Sect. 1, Sub-ss. (3), *post*); and *Jacobs v. Revell*, [1900] 2 Ch. 858 (misstatement of area to which vendor had title). See further, on this point, some of the cases cited in note (n) to § 341 in Ch. XII, Sect. 2, *post*, which illustrate both the rule, and the exceptions thereto, stated in the text, as applied to the assertion by defence, and not by action, of a right to have a contract treated as void.

(r) There was a condition of this character in *Whitemore v. Whitemore* (1869), L. R. 8 Eq. 603, *Re Terry and White's Contract* (1886), 32 C. D. 14, C. A., *Re Davis and Cavey* (1888), 40 C. D. 601, *Jacobs v. Revell, sup.*, *Re Simpson and Thomas Moy, Ltd.* (1909), 53 Sol. J. 376, and *Shepherd v. Croft*, [1911] 1 Ch. 521. See also some of the cases cited in the notes to § 342.

(s) As in *Re Terry and White's Contract, sup.*, where the representee failed to convince a majority of the C. A. that the difference in the area of the property as represented and its actual area was sufficiently substantial to bring the case within the second exception, *Re Simpson and Thomas Moy, Ltd., sup.*, where the representee similarly failed to persuade JOYCE, J., that the description of the premises as freehold, without mentioning that they were subject to a rent-charge, was other than an "honest mistake," or fell within either of the exceptions; and *Shepherd v. Croft*, [1911] 1 Ch. 521, where, the only question being one of material difference in the property by reason of latent defects of title, PARKER, J., held that a house and grounds described as "a desirable residential property" with certain "building advantages" was not rendered a different property by the fact, discovered afterwards, but not disclosed at the time, that a natural watercourse, culverted and piped, ran underneath the property, though this circumstance would affect the value and price). In *Whitemore v. Whitemore, sup.*, there were two conditions, one of the ordinary type, and the other in the less usual and more stringent form: in reference to the former, MALINS, V.-C., held that the deficiency in area proved did not constitute such a discrepancy in point of substance as to defeat the plea, and that, under this condition, the representee was entitled only to the alternative relief of compensation (pp. 605, 606). It was then

obviously easier to arrive at the conclusion that the purchaser shall be compellable to take the land, and have money for the deficiency, than that he is to take less than he bargained for, and have no compensation" (t). Where, however, the representee can establish either fraud, or misdescription in substance, the defence fails, and he is entitled to rescission, no less than if the condition had been in the form more commonly used (u).

Sub-sect. (4). Affirmation of the Contract.

301. The three defences hitherto discussed are founded on proof of the representee's knowledge, belief, or intention at or before the time when the contract or transaction was entered into: the next affirmative plea to be considered is concerned with his state of mind and will, as evinced by his acts and conduct, after the contract and in relation to it.

302. It has already been explained that, on discovery of the true facts, the representee has the right of choosing whether he will affirm or disaffirm the contract or transaction induced by a misrepresentation of those facts, and that this option, when once exercised, is exhausted, and the representee can never afterwards resile from it (x). It follows that, if it can be established that, with full and exact knowledge of all the facts which gave him a title to avoid the contract, the representee has definitely and unequivocally elected to adhere to it, the representor has a valid defence to any proceedings for relief by way of rescission, whether he has or has not any defence to an action for damages, which is a question depending upon other considerations (y).

303. Though the representor may prove conduct on the part of the representee amounting to affirmation, so as to establish a *prima facie*

contended on behalf of the representor that, under the latter condition, the representee was not entitled to compensation either, but the Vice-Chancellor held that this latter condition "must be construed as intended to cover small unintentional errors and inaccuracies, but not to cover reckless and careless statements," such as he found the misrepresentation in question to be (p. 606). Obviously, this view is hopelessly illogical, for either the recklessness and carelessness alluded to amounted merely to honest negligence (see Ch. V, Sect. 2), or to fraudulent disregard of his moral responsibility (see Ch. V, Sect. 1). In the former construction, it would no more invalidate the plea founded on the second condition, than that which rested on the first: on the latter, it would invalidate the one defence as much as the other, and rescission ought to have been granted accordingly, instead of being refused, when the first condition was being dealt with, and thereupon it would have been unnecessary to consider the second. If the decision of MALINS, V.-C., was right, as it probably was, on the first point, it was clearly wrong on the second, and so Lord ESHER, M.R., seems to have thought, judging from his observation on this case in *Re Terry and White's Contract*, *sup.* Note that, if no material discrepancy is shown, that being the only question, the representor's knowledge is immaterial, *Shepherd v. Croft*, *sup.*, at pp. 530, 531.

(t) *Per* BUCKLEY, J., at p. 864 of *Jacobs v. Revell*, *sup.*

(u) See *Jacobs v. Revell*, *sup.* Or the vendor may get a return of his deposit, which assumes the right to rescission: see *Re Davis and Cavey*, *sup.*, though the form of the proceedings precluded STIRLING, J., from giving effect to his opinion by any order on the summons before him.

(x) See Sect. 1, Sub-s. (4) hereof, *ante*. It must always be remembered that if the contract is not voidable, but void, it can no more be affirmed than it can be disaffirmed: see Sect. 1, Sub-s. (4), *ante*.

(y) See Ch. X, *ante*.

defence, the representee may still repel this inchoate plea by establishing—and the onus is from that point upon his shoulders—that, when apparently so affirming, he had not complete knowledge of all the material discrepancies between the representation and the real facts, though he may have had partial information as to some of them, sufficient, perhaps, to engender a suspicion as to the whole. This is only an application of the general principle of jurisprudence,—a principle by no means confined to the present, or to any particular, subject-matter,—that there can be no election where there is no precise cognizance of the material facts (including the rights arising out of these facts) upon which that election is to operate, and from which it derives vitality and significance. This principle has been applied to cases of release of rights (*z*), surrender of property (*a*), and, generally, the confirmation of impeachable transactions (*b*), as well as to cases of misrepresentation in particular, in which, whenever knowledge to the full extent stated has been shown to have been in the possession of the representee at the time of the alleged confirmation, the plea has prevailed (*c*), but, whenever the representor's proof has fallen short of the required minimum, or the representee has established affirmatively such deficiency, the plea, in the one case, has failed from its inherent weakness, and, in the other, has been displaced by the strength of the counter-evidence (*d*).

304. Further, it is incumbent on the representor to prove an unequivocal election by the representee to adhere to the contract. It is not necessary that this election should be indicated by express or direct language: indeed, it is rarely, if ever, that the affirmation takes this form. Acts and conduct, including written and spoken words, from which such an inference may be fairly drawn, are sufficient (*e*), and it is by this means that the

(*z*) *Leeds (Duke) v. Amherst (Earl)*, No. 1 (1846), 2 Ph. 117 (*per* Lord COTTENHAM, L.C., at p. 123: "for that purpose"—*sc.* to establish a case of release—"it is not only necessary to show that the plaintiff knew of the acts of waste having been committed, but that he knew of the rights which they gave him . . . and that, having such knowledge, he did some act amounting to a release of that right").

(*a*) *Wilson v. Thornbury* (1875), 10 Ch. App. 239 (*per* JAMES, L.J., at p. 248, "election by conduct must be by a person who has positive information as to his rights to the property, and, with that knowledge, really means to give that property up." So MELLISH, L.J., at p. 249: "we have to see whether the plaintiff knew what his rights were, and what the material facts on which they depended were, and whether, knowing them, he determined to elect," etc.).

(*d*) *Murray v. Palmer* (1805), 2 Sch. & Lefr. 472, *per* Lord REDESDALE at p. 485.

(*c*) As in *Ogilvie v. Currie* (1868), 37 L. J. (CH.) 541 (where Lord CAIRNS, L.C., pointed out that the shareholder had full knowledge of all the circumstances which gave him the right of election which he exercised), and *Sharpley v. Louth and East Coast Railway Co.* (1876), 2 C. D. 663, C. A. (*per* JAMES, L.J., at p. 685: "the plaintiff, after he knew what the company had done, what it was doing, and what it was able to do . . . for months continued to act as a shareholder, with full knowledge of every circumstance which entitled him, if he ever was so entitled, to be relieved from his shares").

(*d*) As in *Jarrett v. Kennedy* (1848), 6 C. B. 319, 326; *Lachlan v. Reynolds* (1853), Kay, 52, 101 R. R. 523 (*per* WOOD, V.-C., a case in which the representee knew that a certain person was an occupant, but not that he was a hostile occupant, of the property there in question, and therefore had no exact knowledge on the material point); and *Clough v. L. & N. W. Railway Co.* (1871), L. R. 7 Exch. 26, Exch. Ch. (*per* Cur., at pp. 29, 30, 31).

(*e*) Com. Dig. Election, C. 1, and *Clough v. L. & N. W. Railway Co.*, *sup.*, *per* Cur., at p. 34.

defence is in the vast majority of cases sought to be proved. But the acts and conduct relied upon must be inconsistent with any attitude of mind except that of affirmation (*f*), or at all events more consistent with an intention to affirm, than with an intention to repudiate the contract (*g*). It is idle to point to indecisive or equivocal acts or language which may evince no more than a state of doubt, suspicion, or suspended judgment; in that case the representor proves, not an election, but an abstention from election, which not only does not support the plea, but negatives it (*h*).

305. Where, however, the acts and conduct relied upon indicate with reasonable clearness a definite election to affirm, and there is no allegation or proof on the other side that the representee's election was founded on inadequate knowledge of the material facts, the defence succeeds, and the action or other proceeding for rescission fails. Of the numerous decisions illustrative of the success of the defence now under discussion, by far the larger part are cases relating to contracts to take shares in companies (*i*).

(*f*) In the case of a contract for the sale of goods, this is the rule expressed in sect. 35 of the Sale of Goods Act, 1893.

(*g*) Cp. again, as to sale of goods, the above cited sect. 35 of the Sale of Goods Act, 1893.

(*h*) The representee is entitled to suspend his judgment, and to make no election at all: see Sub-s. (7), *post*. Positive and unequivocal acts must be proved: see *Clough v. L. & N. W. Railway Co.*, *sup.*, *per Cur.* at p. 34. Instances of acts held *not* to amount to such unequivocal exercise of election are to be found in *Wontner v. Shairp* (1847), 4 C. B. 404 (attending a meeting of shareholders for the mere purpose of proposing the very thing which was the object of the suit); *Clough v. L. & N. W. Railway Co.*, *sup.* (at pp. 33, 35); *Re Metropolitan Coal Consumers Association, Ex parte Edwards* (1891), 64 L. T. 651 (where the applicant attended only one meeting of shareholders, at which he stayed for a few minutes and did not wait for the discussion, and on one occasion made an inquiry of the secretary as to the price of the shares); and *Re Metrop. Coal Consumers Assocn., Karberg's Case*, [1892] 3 Ch. 1, C. A. (where the applicant was not proved to have done any act at all, but merely to have waited for some time till the decision of the C. A. in the case of another shareholder in respect of the same misrepresentation, which was held to be a reasonable course to adopt).

(*i*) *Campbell v. Fleming* (1834), 1 A. & E. 40 (selling the shares after knowledge of the facts); *Pulsford v. Richards* (1853), 17 Beav. 87 (purchasing further shares after full knowledge); *Re Royal British Bank, Mixer's Case* (1859), 4 De G. & J. 575 (receipt of dividends on the shares: *per* Lord CAMPBELL, L.C., at pp. 586, 587); *Re Hop and Malt Exchange Warehouse Co., Briggs' Case* (1866), L. R. 1 Eq. 483, 487 (instructing broker to sell shares at a premium, though no actual sale took place); *Re Canchar Co., Lawrence's Case* (1867), 2 Ch. App. 412 (*per* Lord CAIRNS, L.J., at pp. 423, 424: here the applicant paid a call without protest, and with knowledge from the memorandum and articles of association that the objects of the company were not as represented in the prospectus, and that his son was attending a committee of investigation in his interests); *Re Russian (Vyksounsky) Ironworks Co., Kincaid's Case* (1867), 2 Ch. App. 420 (*per* Lord CAIRNS, L.J., at p. 426, and TURNER, L.J., at p. 427); *Whitehouse's Case* (1867), L. R. 3 Eq. 790, *Taite's Case* (1867), L. R. 3 Eq. 795; *Scholey v. Central Railway Co. of Venezuela* (1868), L. R. 9 Eq. 266 n. (where the plaintiff "paid a call without remonstrance, and received a dividend," upon which state of facts Lord CAIRNS, L.J., at p. 267 n., observed: "if anything could affirm a voidable contract, it would be conduct of that kind. By receiving a dividend, he elected to continue a member of the company, and having done that he could not come next day, or next week, and file his bill, etc."); *Ogilvie v. Currie* (1868), 37 L. J. (CH.) 541 (where the plaintiff, after months of suspicion, did nothing at all, but relied on the promise of the company to appoint a new secretary and auditor, in the hope, as he admitted, that a compromise would result); *Re Bank of Hindustan, China, and Japan, Campbell's and Hippisley's Cases* (1872), 9 Ch. App. 7 (where the applicants, after a compromise sanctioned by the judge, remained on the list of contributories, took part in the appointment of liquidators, and, without raising any objection, paid calls under balance orders); *Shurpley v. Louth and East Coast Railway Co.* (1876), 2 C. D. 663, C. A. (where the

306. It should be noted that the affirmation of a contract, based on the discovery of the falsity of one of two separate and distinct misrepresentations, though made in one and the same document, or at one and the same time, is no bar to a proceeding for rescission of the contract based on the subsequent discovery of the falsity of the other representation (*k*). Nor will affirmation of a contract, and even recovery of damages, against one of two representors, even though they be partners, prevent the representee obtaining rescission against the other representor (*l*). But where only one representation is complained of from first to last, though it may be false in two or more particulars, the representee who has once affirmed the contract with knowledge of one of such discrepancies only, is precluded from ever afterwards obtaining an order to set it aside on discovery of a fresh point of falsity in the same representation (*m*).

Sub-sect. (5). Where Rescission and Restitution would be unjust to the Representor or to Third Parties.

307. Mutual restitution being a condition of rescission, unless the representee has nothing to restore (*n*), it follows that the court will never set plaintiff, after knowledge that the company's representation as to the capital necessary for making the line was false, insisted on the line not being abandoned, and took an active part in meetings of his fellow-townsmen for the purpose of urging on the company the continuance of the enterprise); *Cargill v. Bower* (1878), 10 C. D. 502, 508, 509 (where the plaintiff, having supported the petition for liquidation of the company, and got his costs in that character, and having commenced an action against it and its directors for damages and rescission, dropped the claim for rescission); *Re Wheel Unity Wood Mining Co., Chynoweth's Case* (1880), 15 C. D. 13, C. A. (where the liquidator of the cost-book mining company had made calls upon the transferee, forfeited his shares, and sued him to judgment, which acts were held to amount to a clear affirmation of the transfer which was sought to be avoided on the ground of the transferor's misrepresentation, and, therefore, a bar to the liquidator's claim to settle such transferor's name on the list of contributories); *Reid v. London and Staffordshire Fire Insurance Co.* (1883), 53 L. J. (CH.) 351 (where the plaintiff, after commencing his action for rescission and rectification of the register, gave notice of discontinuance, and did nothing until he heard that another shareholder had succeeded in the C. A. in a similar action); *Re Dunlop-Truffault Cycle and Tube Manufacturing Co., Ex parte Shearman* (1896), 66 L. J. (CH.) 25 (where the applicant, after a clear notice of repudiation, paid allotment-moneys and instalments in respect of her shares, in the mistaken belief that such payment would strengthen her position, and KEKEWICK, J., held that her conduct in so doing was in fact an affirmation, though she intended the exact contrary); *Re Leyland and Taylor's Contract*, [1900] 2 Ch. 625, C. A. (where, on the sale of land, there being a claim for compensation of the kind mentioned in § 299, *ante*, the representee deliberately resorted to the clause, and elected not to ask for rescission); *Re Metal Constituents, Ltd., Lord Lurgan's Case*, [1902] 1 Ch. 707 (where BUCKLEY, J., at pp. 710, 711, "reviewed the facts in detail, and found that Lord Lurgan had elected to keep the shares after he had become suspicious about the company"); and *Seddon v. North Eastern Salt Co.*, [1905] 1 Ch. 326 (where the plaintiff, after full knowledge, continued to carry on the business of the London Salt Co., and at a profit, and, was held by JOYCE, J., to have thereby affirmed his contract to purchase all the shares of such company).

(*k*) *Re London and Provincial Electric Lighting and Power Co., Ex parte Hale* (1887), 55 L. T. 670.

(*l*) *Rawlins v. Wickham* (1858), 3 De G. & J. 304 (per KNIGHT-BRUCE, L.J., at p. 315, and TURNER, L.J., at p. 322).

(*m*) *Campbell v. Fleming* (1834), 1 A. & E. 40, and *Re Russian (Vyksounsky) Iron Works Co., Whitehouse's Case* (1867), L. R. 3 Eq. 790.

(*n*) In which case rescission is unnecessary, and the remedy available is that described in Sect. 3, Sub-s. (2), *ante*.

aside a contract or transaction in any case where complete *restitutio in integrum* on both sides, and *in specie*, where the property is specific, cannot be effected, for to do so would be unjust to the representor. Nor will rescission be granted, even though such restitution is practicable as between the immediate parties, if the undoing of the contract would prejudicially affect the rights or interests which any third party has, in good faith and for value, acquired under it, whilst it was still unavowed, because this would be obviously unjust to the third party, who would thus be punished for no fault of his own, and for the benefit of the person by whose conduct or inaction he was encouraged to acquire those rights and interests (o).

308. First, as to the class of case where it would be inequitable as between the representor and the representee to avoid the contract. If the representor can prove—and it is probably for him to do so (p)—that the representee received something specific under the contract, that is to say, something other than money or securities or goods incapable of an individual character, and that, by his own act, the nature, quality, or substance—the species, in fact—of this something has been destroyed or changed, the representor establishes a valid affirmative defence, since the representee is not able to satisfy the condition upon which alone rescission is possible. Thus where the property acquired under the contract, such as a mine, a colliery, or a business, has been either worked out or exhausted, or so dealt with as to result in an entire alteration of its physical or commercial character (q), or where shares or securities so acquired have lost

(o) The two classes of case are referred to in a passage from the judgment of the Exchequer Chamber in *Clough v. London and North Western Railway Co.* (1871), L. R. 7 Exch. 26, Exch. Ch., at p. 35: “we think that, so long as he”—the representee—“makes no election, he retains the right to determine it either way, subject to this that if, in the interval while he is deliberating, an innocent third party has acquired an interest in the property, or if, in consequence of his delay, the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind.”

(p) Though the burden is sometimes said, or assumed, to be on the representee of showing that he is in a position to make specific restoration; see, for instance, *Stainbank v. Fernley* (1839), 9 Sim. 556, where, by his bill, the representee offered to retransfer the shares to the representor and repay the dividends he had received in respect of them. It seems, however, to be more sound to regard the restoration as a condition subsequent, as in cases of specific performance, where the decree is made subject to subsequent proof of title, but the defendant may by way of defence allege that the plaintiff not only has no title, but can never acquire one, in which case the onus is clearly on him. Similarly it is conceived that, in cases of rescission, if the representor does not aver, or, having averred, does not prove, impossibility of specific restitution, the order for rescission would go, subject to such restitution; and, if it turns out afterwards that the restitution cannot be effected, the order would become inoperative. See the alternative form of decree in the case cited in note (u), *inf.*

(q) As in *Atwood v. Small* (1838), 6 Cl. & F. 232 (collieries, and iron works and mines, described by Lord COTTENHAM, L.C., at p. 357, as “a property of this description, varying from day to day,” and, therefore, peculiarly the subject of the rule in its most stringent application); *Vigers v. Pike* (1842), 8 Cl. & F. 562 (*per* Lord COTTENHAM, L.C., at p. 651, a case where the representee company had worked out and exhausted the mines which it had acquired under the contract); *Clarke v. Dickson*, No. 1 (1858), E. B. & E. 148 (where the representee had worked the mine, and where ERLE, J., at p. 153, likens the case to that of a man offering to return to the representor a lottery ticket which had turned up a blank, and CROMPTON, J., at p. 155, to that of a butcher who had bought cattle from a grazier offering to return the carcase); *Sheffield Nickel and Silver Plating Co. v. Unwin* (1877), 2 Q. B. D. 215,

their original status, and have become shares or securities of a different legal quality, and with different legal incidents (*r*), the plea prevails, and rescission is refused. But it is of no avail to show a mere depreciation or deterioration of the property, arising in the ordinary course of events, or from natural decay or inherent defects, and in nowise imputable to the positive acts and conduct of the representee (*s*). Further, even where the defence is otherwise good, it is open to the representee to defeat it by proof that the representor has deliberately stood by, and silently encouraged the acts of the representee which are alleged to have produced the alteration or extinction of the property, with full consciousness of his own misrepresentation, and for the sole purpose of providing himself with materials for the assertion of the plea, if and when his fraud should be discovered (*t*). Where there is a doubt whether the representee will or will not be able to make, or procure to be made, a restoration *in specie* to the representor, the judgment may be framed in the alternative, that is to say, for rescission, if the restoration is effected within a stated time, and, if not, for dismissal of the action (*u*).

309. In the second of the two classes of case above referred to, though the representor is not in a position to complain of the slightest injustice towards himself by reason of any acts of the representee, he is in a position, and has a right, to call the attention of the court to the fact that innocent third parties who have for value acquired property or rights under the contract will be prejudicially affected by an order for rescission, and to rely

223, 224 (where the position of both parties in relation to the patents and businesses the subject of the contract had been entirely changed); and *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392, C. A. (where, at p. 433, LINDLEY, M.R., observes that "the real difficulty in the way of rescission lies in the impossibility of restoring the parties to their original position," and, at pp. 433, 434, enumerates the circumstances which resulted in this impossibility, viz. that the plaintiff company had called upon the defendant syndicate to make, and the syndicate had made, outlays upon the property; that the company had worked the property at a profit and received dividends; that the syndicate had sold shares received in part payment; that afterwards an entirely new board of directors had been formed, who even then claimed no rescission, and worked the business as before at a profit, etc.).

(*r*) *Clarke v. Dickson*, No. 1, *sup.* (per ERLE, J., at pp. 153, 154, and CROMPTON, J., at p. 155, where, besides the working out of the mines, the additional fact is referred to that the representee, having been instrumental in getting the cost-book mining company converted into a joint stock company had disabled himself from returning the shares in the same plight as that in which he had received them); and *Western Bank of Scotland v. Addie* (1867), L. R. 1 H. L. (Sc.) 145 (where an incorporated company under the Banking Act, 7 Geo. 4, c. 67, had been put an end to, and was thereupon registered as an incorporated company under the Joint Stock Companies Acts, 1856 and 1857, whereby, says Lord CRANWORTH, at pp. 165, 166, the representee was not in a position to restore the very thing which he had acquired, and on this ground, quite apart from the bar constituted by the winding up, was precluded from obtaining rescission: cp. the observations of Lord CHELMSFORD, L.C., at p. 160).

(*s*) *Western Bank of Scotland v. Addie*, *sup.*, per Lord CRANWORTH at pp. 165, 166; and *Adam v. Newbigging* (1888), 13 A. C. 309, H. L., per Lord WATSON at p. 323, and Lord HERSHELL, at pp. 330, 331.

(*t*) *Maturin v. Tredennick* (1864), 12 W. R. 740.

(*u*) See the form of the decree set out at p. 245 of *Lindsay Petroleum Co. v. Hurd* (1874), L. R. 5 P. C. 221, where there was a question whether the company, having been dissolved, could eventually, through other parties, procure the property to be reconveyed to the representors,

upon that fact as an affirmative defence; and, on furnishing the necessary proof, the assistance of the court so invoked will be given to the representor, not in the least out of any consideration for him, or the merits of the plea (for there are none), but simply because no court will pronounce a judgment which, however equitable as between the immediate parties, must necessarily have the effect of taking away or injuring the property or rights of others. Whilst such a refusal of relief is an act of justice to the third party, it cannot be deemed unjust to the representee who, though he has actively done no injury to such third party, has, by inaction, made it possible for him, and indeed encouraged him, to enter into transactions, payments, incur liabilities, give credit, or otherwise alter his position, on the faith of the continuing subsistence and validity of the contract which it is sought to annul. The representee is under no obligation to make his election whether to affirm or avoid the contract within any specified time, or at all: he may sit on the fence and adopt a waiting policy for as long as he pleases, but he does so at his own risk, and cannot complain if in the meantime rights have been acquired by others which must be respected, and which cannot be respected without depriving him of the rights which he would otherwise have been entitled to enforce against the representor (x).

310. The plea in question is most frequently raised, and established, where the contract sought to be rescinded is a contract to take shares in a company. Apart from the class of case in which the company is in process of liquidation, which circumstance is a bar in itself, as will presently be seen (y), and apart, therefore, from the question of the rights of creditors, it has always been held that a very slight delay on the part of the shareholder, after knowledge of the falsity of the representation, will disentitle him to avoid his contract, the ground being that, from the moment when his name is entered on the register of members, which is a document accessible to the public (z), it is at least possible that other persons may have inspected that register and joined the company on the faith of such entry (a). No delay can be imputed to the shareholder until he is apprised

(x) See Sub-s. (7), *post*, as to the significance of delay in this respect.

(y) See Sub-s. (6), *inf*.

(z) See sect. 30 of the Companies (Consolidation) Act, 1908.

(a) *Central Railway Co. of Venezuela v. Kisch* (1867), L. R. 2 H. L. 99 (*per* Lord ROMILLY at p. 125: "a contract between a company and an individual differs from a contract between two individuals alone in this respect that, upon the faith of his being a member of the company, various persons are induced to deal with the company, and to become shareholders. . . . The result is that it becomes necessary for him, in order to set aside a contract of this description, that he should come with the utmost diligence for that purpose, so that no person may be misled by the fact of his remaining a member of the association"); *Scholey v. Central Railway Co. of Venezuela* (1868), L. R. 9 Eq. 266 n. (*per* Lord CAIRNS, L.C., at p. 267 n. "the court would be most careful to see, in a company going on and trading, in which the rights of the shareholders and others varied from day to day, that a person coming to complain of misrepresentation of this kind, and coming to avoid a voidable contract, came within the shortest limit of time that was fairly possible in such a case"); *Ogilvie v. Currie* (1868), 37 L. J. (CH.) 541 (*per* Lord CAIRNS, L.C., at p. 546: "there was this company trading, every day of necessity involving an alteration in its position, and the position of his fellow-shareholders"); *Re Hull and County Bank, Burgess's Case* (1880), 15 C. D. 507 (*per* JESSEL, M.R., at p. 512: "they"—the other shareholders—"acquired

of the whole of the real facts, but where the discrepancy between the actual and the represented facts relates to the objects and business of the company, he is presumed to have had such knowledge immediately upon the registration of the memorandum and articles of association; whence it follows that, in such cases, the period during which he must act in order to preclude the possibility of the defence under discussion being raised against him, besides being of brief duration, commences at a specially early stage (b), and, where the memorandum and articles are registered at the same time as, or before, the issue of the prospectus (which is now usually the case), it commences at once (c).

Sub-sect. (6). The Liquidation of the Company, in Cases of Contracts to take Shares.

311. Where the contract sought to be set aside is a contract to take shares in a company registered or formed pursuant to the statutory enactments in that behalf, and the company goes into liquidation, every person whose name is properly on the register of members at the date of the commencement of the liquidation is a contributory to the debts and liabilities of the company, to the extent (if any) to which his shares are not fully paid up, and the liquidator is not only entitled, but bound, to place his name on the list of contributories in discharge of his duty as an

rights as innocent parties, which this applicant seeks to take away from them"); *Re Snyder Dynamite Projectile Co., Skelton's Case* (1893), 68 L. T. 210 (per STIRLING, J.); *Aaron's Reefs, Ltd. v. Twiss*, [1895] A. C. 273 (per Lord DAVEY, who, at p. 294, insists that the representee "must exercise his right of repudiation with extreme promptness after his discovery of the fraud or misrepresentation, for this reason: the putting of his name on the register may have induced other persons to give credit to the company, or to become members of the company"); and *Re Metal Constituents, Ltd., Lord Lurgan's Case*, [1902] 1 Ch. 707 (per BUCKLEY, J., at p. 710: "his"—Lord L.'s—"signature to the memorandum of association made him on registration a member of the company, and bound him not only in favour of the company, but in favour of every other person who became a member of the company," whence it followed that, if judgment were given for Lord L., the unjust result would be "that every person who subsequently became a member would be deprived of the benefit which he supposed he had by Lord L. being a member").

(b) By sect. 14 (1) of the Companies (Consolidation) Act, 1908 (which is a reproduction of corresponding sections in previous Companies Acts), every member is deemed to have executed the memorandum and articles of the company when registered. See the observations of Lord WESTBURY, L.C., at p. 734 of *New Brunswick and Canada Railway and Land Co. v. Conybeare* (1862), 9 H. L. C. 711: "when the respondent took these shares . . . in the eye of the law, and by force of the statute under which this company was formed, he must be considered as having impliedly executed this deed of association," and, therefore, to have had notice of all the provisions of the contract thereby created." This being so, it was always held, and with particular insistence and emphasis by Lord CAIRNS, L.J., that it was the duty, or at all events the business and the interest, of the shareholder, if he was desirous of removing a possible or probable bar to all relief by way of rescission, to move with more than ordinary promptitude: see his observations at pp. 423, 424 of *Re Cachar Co., Lawrence's Case* (1867), 2 Ch. App. 412; pp. 426, 427, of *Re Russian (Vyksounsky) Iron Works Co., Kincaid's Case* 1867, 2 Ch. App. 420; pp. 540, 541, of *Re Madrid Bank, Wilkinson's Case* (1867), 2 Ch. App. 536; and p. 684 of *Re Barned's Banking Co., Peel's Case* (1867), 2 Ch. App. 674.

(c) It is provided by sect. 81 (1) of the Companies (Consolidation) Act, 1908, that every prospectus must state (*inter alia*) "the contents of the memorandum."

officer of the court. If such a person therefore is minded to proceed against the company for rescission of his contract, or for rectification of the register, or for the removal of his name from the list of contributories, on the ground of misrepresentation, the mere commencement of the winding up whilst his name is in fact, and properly, upon the register, is an absolute defence and bar to such proceedings. The representee may be in a position to prove the falsity of the representation, the inducement, and the materiality; he may even have repudiated the contract, so far as giving notice of such repudiation is concerned, and may have taken this step immediately upon, or within what would otherwise have been deemed a reasonable time after, discovery of the truth; but, if he has not in fact procured the actual physical removal of his name from the register, nor taken any of the steps, mentioned below (*d*), which the law deems equivalent thereto, his name is none the less properly on the register at the date of the liquidation, and this fact is still an insuperable obstacle in the way of rescission.

312. The theory upon which the defence under discussion rests, and by which it is justified, is substantially the doctrine of the inviolability of the *jus tertii* in conjunction with, and in application to, the express provisions of company legislation. The liquidation, by force of these statutory provisions, alters entirely the position and relation to one another of the various parties concerned. There is no longer, except in name, a company at all; there are no longer shareholders in the same sense as before; for the winding-up order “makes the shareholders contributories, and contributories in a totally different way, in some respects, as regards the debts and liabilities of the concern, from what they were before” (*e*). If, in favour of any one of these contributories, rescission were to be granted, the burden on the other contributories, presumably as innocent as himself, would be proportionally increased; whilst the creditors would lose a proportionate part of the fund, or rather of the responsibility of the body of persons answerable for the satisfaction of their claims, to which, on the faith of the subsistence and validity of the contract, they had justifiably looked (*f*). Each of these results being manifestly unjust, the court will not make an order which will produce both. “The general principle is that no contract can be rescinded so as to affect rights acquired *bonâ fide* by third parties under it. It is true that the creditors and the other shareholders have not acquired direct interests under the contract, but they have

(*d*) See §§ 316–320, *inf*.

(*e*) *Per* JESSEL, M.R., at p. 511 of *Re Hull and County Bank, Burgess's Case* (1880), 15 C. D. 507.

(*f*) See the observations of Lord CRANWORTH at p. 366 of *Oakes v. Turquand, Peek v. Same* (1867), L. R. 2 H. L. 325: “this is obviously the reason why the new statute”—he is referring to sect. 11 of the Act of 1862, which is now sect. 30 of the Act of 1908—“opened the register to the inspection of all the world. . . . The permission to all persons not shareholders to inspect the register, and so to ascertain who are shareholders, and to what extent they are liable would have been an unwarrantable exposure of the affairs of the company, were it not that all persons have an interest in knowing who are liable, and to what extent.”

acquired an indirect interest. The shareholders have got a co-contributory, the creditors have got another person liable to contribute to the assets of the concern, so that, although in the case of ordinary voidable contracts simple repudiation is enough, there must be, in the case of a voidable contract to take shares, repudiation and something more before the winding up commences" (g), and "equities which would be sufficient as between the shareholders and the company cannot be set up against the creditors and co-contributories" (h).

313. Of the two classes of persons concerned, the class of creditors is that which is the more seriously affected, and against which the release of a shareholder would operate with the more obvious injustice. If A. is in partnership with B., and C. is a creditor of the firm, it would be a violation of the plainest principles of equity and honesty, that A. should be allowed to retire from the firm, on the ground that he was induced to become a member by the misrepresentation of B., without remaining liable to C. And, in the case of an ordinary partnership at common law, A. does so remain liable, and therefore an order to set aside a contract between two persons to enter into such a partnership can properly be made, because no *jus tertii* is in the slightest degree disturbed thereby (i). But the case of a company registered or framed under the Companies Acts, which is a partnership or association legalized by the statutes only and subject to the conditions and restrictions imposed thereby, is very different; the shares in such a company are transferable without the consent of the creditors whilst the company is a going concern, and during that period, therefore, the creditors have no right to complain of any shareholder throwing back his shares on the company for misrepresentation, or any other cause; but, directly the company has become insolvent, a new state of things arises, and the creditors must be injured by the withdrawal of a contributory from the body of persons, now crystallized and no longer fluctuating, whose responsibility, to the extent of the forced contributions leviable upon them, is the only security they thenceforth can have for the satisfaction of their claims (k). This view has been adopted and acted upon throughout the whole history of company legislation, which, so far as material to the point under discussion, is as follows (l). Under the Acts of 1844, 1848, and 1849, a creditor could levy execution on any shareholder. In 1855, by the statute 18 & 19 Vict. c. 133, limited liability was introduced, but creditors, to the extent of such limited liability, could still levy

(g) *Per* FRY, L.J., at p. 439 of *Re Scottish Petroleum Co., Ex parte Wallace* (1883), 23 C. D. 413, C. A.

(h) *Per* BAGGALLAY, L.J., at p. 429 of the same case.

(i) *Tennent v. City of Glasgow Bank* (1879), 4 App. Cas. 615, *per* Lord CAIRNS, L.C., at pp. 621, 622.

(k) *Ibid.*

(l) This short sketch of company legislation, in connection with the topic dealt with in the text, down to 1862, is given by Lord CHELMSFORD, L.C., at pp. 346, 347 of *Oakes v. Turguand, Peek v. Same* (1867), L. R. 2 H. L. 325. See Lord Halsbury's *Laws of England*, title "Companies," vol. v, pp. 25 *et seq.*, for a complete history of company legislation.

execution as before. Then came the Joint Stock Companies Acts of 1856, 1857, and 1858, which provided for winding up in case of insolvency, and, in that event, restricted the rights of creditors to the exaction of forced contributions in the liquidation, and abolished the old power of levying execution on the property of individual shareholders. The Companies Acts, 1862 and 1867, the material provisions of which are now reproduced in the Companies (Consolidation) Act, 1908, followed; but all these statutes, beginning with those of 1856, "merely changed the security which the creditor previously possessed by issuing execution against the shareholders . . . into a right to obtain satisfaction of his debt by means of forced contributions." The principle, however, has always been the same, viz. that every creditor has a right to look to the responsibility of any person who is at the material date on the register under a contract which, though voidable, has not in fact been avoided, and it has always been held, whether in cases under the statutes before 1862 (*m*), or in those of a later date (*n*), that no relief by way of rescission will ever be granted

(*m*) See the four cases decided in reference to the Royal British Bank by the Courts of Q. B., C. P., Exch. and Chancery respectively, viz. *Henderson v. Royal British Bank* (1857), 7 E. & B. 356 (*per* Lord CAMPBELL, C.J., at pp. 364, 365), *Powis v. Harding* (1857), 2 C. B. (N. S.) 533 (*per* COCKBURN, C.J.), *Daniell v. Royal British Bank* (1857), 1 H. & N. 681, and *Re Royal British Bank, Ex parte Nicol* (1859), 3 De G. & J. 387. The decision of KINDERSLEY, V.-C., to the contrary in *Re Royal British Bank, Ex parte Brockwell* (1857), 26 L. J. (CH.) 855 cannot be accepted as sound.

(*n*) *Oakes v. Turquand, sup.* (*per* Lord CHELMSFORD, L.C., at p. 350: "it is true that there was no contract between the creditor and the shareholders . . . but he must be taken to have known what his rights were under the Act, and that he had the security of all the persons whose names were to be found upon the register, and who had agreed to become shareholders," and, at p. 353, "if this allottee could escape, so could all the others, and the creditor would be left with no remedy except against the contributions . . . of those who were fraudulent," and Lord CRANWORTH at p. 367: "it"—the Legislature—"intended to put the persons whose names are on it"—the register—"in the same position towards creditors (subject of course to the statutory restrictions) as persons engaged in ordinary partnership, or persons trading formerly under the Act of 1844"); *Tennent v. City of Glasgow Bank, sup.*; and, generally, the cases cited in the notes to this Sub-section. In *Downes v. Ship* (1868), L. R. 3 H. L. 343, the opinion of the House of Lords was in accordance with the above decisions, though, in consequence of a chapter of blunders in practice at an early stage of the proceedings, the House was disabled from giving effect to this opinion. What happened in this curious, and almost comical, case, was this. On Ship's application to have his name removed from the register of members and list of contributories, WOOD, V.-C. (quite wrongly), made an order as prayed, notwithstanding the liquidation of the company: *Ship's Case* (1865), 13 W. R. 450. Thereupon one Downes, a promoter of the company who was responsible for the prospectus, asked for, and (very strangely) was granted by the Lords Justices, leave to intervene and appeal—(1865), 13 W. R. 531—the liquidator being apparently unwilling, or not having the funds to do so. Not till the appeal of this very unmeritorious person came on to be heard did it dawn upon the Lords Justices that they had acted without the slightest jurisdiction in giving leave to appeal to one who was not a party to the proceedings, and could by no possibility have any *locus standi*, and they expressed their repentance of this error by dismissing the appeal which they had themselves encouraged, and on grounds which showed that such encouragement never ought to have been given—(1865), 13 W. R. 599; 2 De G. & J. 544. Nothing daunted, Downes appealed to the House of Lords, and his appeal was again dismissed, and on the same ground: but the opinion was clearly expressed that, if the liquidator, who was the only person entitled to do so, had appealed from the order of WOOD, V.-C., he would have succeeded (*per* Lord CRANWORTH, at p. 356), and it was intimated that it might not be too late even then for him to take the necessary steps, and, indeed, he was almost invited to take them. But, so far as the reports are concerned, "the rest is silence."

which will prejudice this established right of the creditors, as, after winding up, it inevitably must.

314. Though it is the creditors who in most cases are mainly, if not solely, interested in the withdrawal of any name from the list of contributories, it is clear that an order for rescission would, on precisely the same principle, work a similar injustice towards those who were the representee's fellow shareholders, and are now his co-contributories, since, by such withdrawal, the amount of the call to be made by the liquidator on them would be proportionately increased for the purpose of satisfying the creditors (o), or (where there are sufficient assets to meet their claims) for the purposes of discharging the costs of the winding up, and the adjustment of the rights of the contributories *inter se* (p).

315. It is immaterial in which of its three possible forms (q) the company is being wound up (r). The date at which the liquidation is deemed to have commenced, for the purposes of the defence in question, is the date of the petition, not of the order, because, by the statute, the order when made relates back to the former date (s). Further, it is not absolutely necessary that the liquidation should have formally commenced, in order to support the plea, if the company has actually stopped payment, and given public notice thereof, and closed its doors (t); but it is not enough to prove the mere fact of insolvency, where no steps of any kind, formal or informal, have been taken towards the initiation of the winding-up, and, in such circumstances relief may be given, at all events on proof that no creditor is likely to be prejudiced (u).

316. It has been noticed that the plea may be defeated, notwithstanding that the representee's name was on the register of members at the commencement of the winding up, by proof of facts which the law deems equivalent to the removal of his name; that is to say, if, in the language of FRY,

(o) In *Henderson v. Royal British Bank* (1857), 7 E. & B. 356 (per Lord CAMPBELL, C.J., at p. 364), *Downes v. Ship, sup.* (per Lord CRANWORTH, at pp. 355, 356: "or even against other innocent shareholders"), *Ogilvie v. Currie* (1868), 37 L. J. (CH.) 541 (per Lord CAIRNS, L.C., at pp. 543-547), *Re Hull and County Bank, Burgess's Case* (1880), 15 C. D. 507 (per JESSEL, M.R., at pp. 511-514), and *Re Scottish Petroleum Co., Ex parte Wallace* (1883), 23 C. D. 413, C. A. (per FRY, L.J., at p. 439), the point of view of the fellow-shareholders and co-contributories is discussed, and the injustice done to them, apart from that done to the creditors, by an order for rescission in favour of one who was on the register at the date of the commencement of the liquidation, is insisted on.

(p) In *Hull and County Bank, Burgess's case, sup.*, it was admitted that there was enough to pay all the creditors, and it was strongly, but vainly, urged upon the court that this fact made a difference.

(q) Voluntary, compulsory, or under the supervision of the court. See the Companies (Consolidation) Act, 1908, s. 122.

(r) *Stone v. City and County Bank, Collins v. Same* (1877), 3 C. P. D. 282, C. A. (per BRAMWELL, L.J., at pp. 305, 306, BRETT, L.J., at pp. 310-312, and COTTON, L.J., at pp. 313-315). In that case the liquidation was voluntary.

(s) *Kent v. Freehold Land and Brickmaking Co.* (1868), 3 Ch. App. 493 (per Lord CAIRNS, L.C., at p. 494).

(t) *Tennent v. City of Glasgow Bank* (1879), 4 App. Cas. 615 (per Lord CAIRNS, L.C., at pp. 622, 623).

(u) *Re London and Leeds Bank* (1887), 56 L. J. (Ch.) 321 (per STIRLING, J., at pp. 324-326, where he explains how very special, and unlikely to recur, the circumstances were in *Tennent v. Glasgow City Bank*).

L.J. (x), the representee can show that he has "done something more than" merely repudiate his contract to take shares. It is now well settled what this "something more" comprises, and what it excludes. The representee must establish that, before the date of the commencement of the liquidation, he has commenced proceedings against the company for rescission, or asserted his claim to such relief in proceedings instituted against him by the company; or that the company has entered into a binding agreement with him to remove his name from the register, and is therefore in default in not having done so, in which case his name is off the register in contemplation of law; or that he has entered into an agreement with the company whereby he and it have both undertaken to be bound by the result of proceedings for rescission already commenced by some other shareholder in respect of the same misrepresentation as that in question, in which case, he is, in contemplation of law, as against the company, in precisely the same position as if he were a party to those proceedings (y).

317. The theory upon which the commencement of proceedings by the representee before the liquidation operates as a good answer to the plea, and entitles him, if otherwise entitled, to have the contract set aside, or the register or list of contributories rectified or varied, is that, just as the winding-up order, if and when made, relates back to the filing of the petition, so the order for rescission, if and when made, relates back to the commencement of the proceedings, and, indeed, as has been seen (z), to an even earlier date, viz. that of the contract itself, which is thereby declared void *ab initio*. And not only is the representee entitled to succeed, as against the defence in question, when he has himself been the *actor* in a suit or application against the company (a), but also where, in an action for calls brought by the company, he has asserted his right to have the contract avoided in a counter-claim or affirmative defence (b), or even in an affidavit in answer to the company's application for judgment under O. xiv, in which he has stated his intention of so counter-claiming, and on which he has obtained leave to defend (c).

(x) See § 312, *ante*, and note (e) thereto.

(y) All three modes of surmounting the *prima facie* bar are the subject of a comprehensive statement by KAY, J., in *Re Lennox Publishing Co., Ex parte Storey* (1890), 62 L. T. 791.

(z) *Vide ante*, § 271.

(a) As in *Reese River Silver Mining Co. v. Smith* (1869), L. R. 4 H. L. 64, and *Re Metropolitan Coal Consumers' Association, Karberg's Case*, [1892] 3 Ch. 1, C. A. (see the observations of LINDLEY, L.J., at p. 10). It is to be observed that if a representee, having commenced proceedings before the winding up in respect of a specified misrepresentation, desires to amend his statement of claim after that date, he will not be allowed to do so, if the amendment consists in the assertion of another misrepresentation, and so in effect amounts to the bringing of a fresh action, for to this fresh action the liquidation would clearly be a bar; but if limited to the mere expression of the original claim in a better shape and with greater precision and detail, the amendment will be allowed, and, in that case, the liquidation will no more be a bar to the claim as amplified than it was to the claim as originally pleaded: see *Cocksedge v. Metropolitan Coal Consumers Association* (1891), 65 L. T. 432, C. A.

(b) *Re Warren's Blacking Co., Pentelow's case* (1869), 4 Ch. App. 178, and *Re General Railway Syndicate, Whiteley's case*, [1900] 1 Ch. 365, C. A.

(c) See the case last cited. The decisions in *Re Cleveland Iron Co., Ex parte*

318. Secondly, if the parties have obviated the necessity of resorting to litigation at all by means of an agreement for good consideration binding the company to remove the representee's name from the register, such agreement having been definitely concluded before the commencement of the liquidation, this again is sufficient to render the plea ineffective, for the name is, in such case, not properly or *de jure* on the register (*d*). But where the agreement to remove the name is made between several repudiating shareholders acting by an agent, and the particular representee seeking to have his contract to take shares set aside, fails to prove that he has expressly or impliedly authorized such agent, he fails to prove the agreement so far as he is concerned, and, therefore, to obtain rescission (*e*). And where the company's agreement is, not to remove the name from the register, but to allow the representee to transfer his shares to one of the directors, and the agreement has not been completed by registration of the transfer at the date of the liquidation, so that the name is then still on the register, the representee has not established what is required to authorize the plea, and no rescission can be ordered (*f*).

319. The third class of case is where the representee, though he has neither sued the company for rescission, nor entered into any agreement with it that such rescission shall be voluntarily effected, has nevertheless done something which partakes of the nature both of a proceeding *in invitum* and a voluntary arrangement; that is the say, where the representee has agreed with the company that both he and it shall be bound by the result of a pending action or application by another shareholder for rescission in respect of the same misrepresentation, which is regarded as tantamount in law to his having been a co-plaintiff or co-applicant in such pending proceeding. In all such cases, therefore, the representee has always been held as much entitled to relief as if they fell within the first class (*g*). But where such an agreement, binding both parties and concluded before the commencement of the winding up, is not alleged, or, having been alleged, is not fully proved, the plea succeeds and the representee fails (*h*).

Stevenson (1867), 16 W. R. 95, and *Re Etna Insurance Co., Persse's Case* (1871), Ir. R. 6 Eq. 298, so far as they are in conflict with *Whiteley's Case*, must be considered to have been overruled thereby.

(*d*) *Re Etna Insurance Co., Ex parte Shiels and Others* (1873), Ir. R. 7 Eq. 245, where the applicants had demanded, as of right, the removal of their names from the register on the ground of misrepresentation, and the directors had agreed to do so, and were in default in not having done so; and *Re Scottish Petroleum Co., MacLagan's Case* (1882), 51 L. J. (CH.) 841, where a similar agreement was made between the applicant and one director of the company only, there being authority conferred by the articles on a single director to bind the company.

(*e*) *Re London and County General Agency Association, Hare's Case* (1869), 4 Ch. App. 503.

(*f*) *Re Anglo-Danubian Steam Navigation and Colliery Co., Walker's Case* (1868), L. R. 6 Eq. 30.

(*g*) As in *Re Estates Investment Co., Pawle's Case* (1869), 4 Ch. App. 497.

(*h*) *Re Estates Investment Co., Ashley's Case* (1870), L. R. 9 Eq. 263 (where a committee of repudiating allottees had agreed to be bound by the result of another shareholder's proceedings against the company, but Ashley failed to prove that he was a

320. Whenever the representee is not in a position to bring the case within any of the three classes abovementioned, his claim to rescission has always been defeated (*i*), unless, of course, he can show that his name has somehow or another, whether on the ground of misrepresentation (*k*), or on any other ground, disappeared from the register before the winding up, or that his shares have been in fact forfeited for whatever cause, or that there never was any concluded or binding contract at all between him and the company to take the shares (*l*).

Sub-sect. (7). Delay, Laches, and Acquiescence may constitute Evidence of, or give Scope for, certain of the foregoing Defences, but do not per se constitute Defence to Rescission.

321. Delay, laches, and acquiescence are constantly referred to in connection with proceedings for rescission as if, of themselves, they constituted affirmative defences thereto. This is quite a mistake. And it is a still graver error to use these expressions (as the term "laches" in particular is frequently used) with an underlying suggestion that the representee owes a duty to the representor in the matter, the failure to discharge which renders him "guilty" of conduct which, of itself, raises a personal equity against him in favour of the representor. The only legal consequence of the representee's inaction is either to furnish some evidence, with other facts, in support of a plea of knowledge, or affirmation, against himself, or to give scope for the intervention of the *jus tertii*, or of the plea of inability to make specific restitution to the representor; but where the inaction, for however long a period it extends, is not sufficient to constitute such evidence, or where, notwithstanding the lapse of time, no innocent person has in fact acquired rights or interests under the contracts sought to be set aside, and the property to be restored to the representor, as the condition of rescission, can be so restored in the same plight as that in which it was received, the

member of this committee, or a party to the agreement); and *Re Scottish Petroleum Co., Ex parte Wallace* (1883), 23 C. D. 413, C. A. (where one Anderson, whilst the company was a going concern had obtained an order for the rectification of the register, on the ground of the same misrepresentation as that of which Wallace was complaining—see *Anderson's Case* (1881), 17 C. D. 373—but there was no binding agreement that this case should govern those of the other repudiating allottees, and therefore no relief could be given: *per BAGGALLAY, L.J.*, at pp. 432–435, *LINDLEY, L.J.*, at pp. 435–437, and *FRY, L.J.*, at pp. 439).

(*i*) As it was in (e.g.) *Re Lennox Publishing Co., Ex parte Storey* (1890), 62 L. T. 791, and *Re Central Klondyke Gold Mining and Trading Co., Thomson's Case* (1898), 5 Mans. 282.

(*k*) As in *Re Life Association of England, Blake's Case* (1865), 34 Beav. 639 (where, the representee having threatened criminal proceedings, the company were only too pleased and anxious not only to repay his deposit, but to take his name off the register, before the commencement of the winding up, and the liquidator in vain sought to fix him as a contributory). The mere return of the deposit, without rectification of the register, is not enough to defeat the plea, and the two decisions of *ROMILLY, M.R.*, to the contrary in *Re Canadian Native Oil Co., Fox's Case* (1868), L. R. 5 Eq. 118, and *Re Western Insurance Co., Brigg's Case* (1869), 19 L. T. 758, are clearly bad: see the observations of *LINDLEY, L.J.*, at p. 437 of *Re Scottish Petroleum Co., Ex parte Wallace, sup.*

(*l*) See § 261 in Sect. 2, *ante*.

delay, laches, or so-called "acquiescence" goes for nothing,—which is tantamount to saying that, *per se*, these matters constitute no defence.

322. To take the first two of these expressions (which in reality both mean the same thing as applied to cases of rescission), "delay" indicates either the mere lapse of time (like the French *délai*)—in which sense it is obviously ridiculous to attribute it to any one as a default (yet this is implied in the very common phrase "guilty of delay")—or an omission or neglect on the representee's part to avoid the contract or transaction within a reasonable time (this being also the connotation of "laches"), which again cannot be described as a default on his part unless it can be shown (which it cannot) that he owed any duty to the representor in that behalf. A representee is neither punished for, nor prejudiced by, delay in itself; though he may be seriously prejudiced by the rights which, during his inertia and supineness, he has allowed others to acquire against him. "I take it to be a settled doctrine of equity," said JESSEL, M.R. (*m*), "not only as regards specific performance, but also as regards rescission, that this is not an answer, unless there is such delay as constitutes a defence under the Statute of Limitations. That, of course, is quite a different thing." The period during which the lapse of time counts for any purpose whatever does not even begin to run until the representee's right of election accrues, that is, until he has knowledge of all the facts giving him that right (*n*); and then only for the purposes mentioned. The representee may, after full consciousness of such rights as he ever had, remain inactive and impassive for so long a period as to justify an inference of fact that from the first he never had any such rights as he pretends to have had, and that he never was deceived at all (*o*), or that he had originally agreed to waive inquiry, or not to rely upon the alleged or any misrepresentation (*p*), or that, without having so agreed in the first instance, he afterwards deliberately elected to affirm the contract which, if he had chosen to do so, he might have rescinded (*q*); or the representee's delay,

(*m*) At p. 13 of *Redgrave v. Hurd* (1881), 20 C. D. 1. Cp. the passage from *Lindsay Petroleum Co. v. Hurd* (1874), L. R. 5 P. C. 221, which is transcribed in the text.

(*n*) *Rawlins v. Wickham* (1858), 3 De G. & J. 304 (*per* KNIGHT-BRUCE, L.J., at p. 314, and TURNER, L.J., at pp. 318-321); and *Lindsay Petroleum Co. v. Hurd*, *sup.*, at p. 241 ("in order that the remedy should be lost by laches or decay, . . . it is necessary that there should be sufficient knowledge of the facts constituting the title to relief").

(*o*) See Ch. X, Sect. 2, Sub-s. (1), *ante*.

(*p*) See Ch. X, Sect. 2, Sub-s. (2), *ante*, and the passage from *Lindsay Petroleum Co. v. Hurd*, *sup.* cited in the text.

(*q*) *Clough v. London and North Western Railway Company* (1871), L. R. 7 Exch. 26, Exch. Ch. (at p. 34: "we think the party defrauded may keep the question open so long as he does nothing to affirm the contract"; and at p. 35: "lapse of time without rescinding will furnish evidence that he has determined to affirm the contract, and when the lapse of time is great, it probably would in practice be treated as conclusive evidence that he has so determined"); and *Aaron's Reefs, Ltd. v. Twiss*, [1896] A. C. 273, H. L. (*per* Lord DAVEY at p. 294: "lapse of time without rescinding may furnish evidence of an intention to affirm the contract. But the cogency of this evidence depends upon the particular circumstances of the case, and the nature of the contract in question").

without furnishing, or contributing to, evidence of anything, may give "room and verge" for the intervention of the *jus tertii*, or for an alteration in the character of the subject-matter of the contract, or, in company cases, the winding up of the company; and, whether in any particular case any of these events supervenes or not, it is clear that the longer the delay, the greater the peril and possibility of their so doing must be. "We think," said the Exchequer Chamber, "that, so long as he" (the representee) "makes no election, he retains the right to determine it either way, subject to this that, if in the interval while he is still deliberating, an innocent third party has acquired an interest in the property, or if, in consequence of his delay, the position even of the wrongdoer is affected"—that is, where the representee has incapacitated himself from restoring to the representor *in specie* that which he originally received from him *in specie*—"it will preclude him from exercising his right to rescind" (r). To the same effect it has been laid down in the Privy Council that "the doctrine of laches in courts of equity is not an arbitrary or technical doctrine. Where it would be *practically unjust* to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where, by his conduct and neglect, he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him, if the remedy was afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which would otherwise be just, is founded upon mere delay, that delay, of course, not amounting to a bar to any statute of limitations, the validity of that defence must be tried upon principles substantially equitable" (s).

323. It would appear, therefore, that where a representee is said to have been "guilty" of delay or laches, what is meant is that his delay or laches amounts to waiver, or affirmation, or that it has given rise to the other affirmative pleas above mentioned (in which case it is unnecessary and misleading to make use of the phrases in question at all, or any phrases other than those appropriate to characterize such pleas). Unless this is meant, the expressions, since they point to nothing which is a defence at all, have no meaning whatsoever, except in the highly metaphorical sense in which a man may be said to have been guilty of a breach of duty to himself, or of a neglect of that regard for his own interests which is dictated by counsels of worldly wisdom and ordinary business sagacity, embodied in such proverbial philosophy as "strike while the iron is hot," or Iago's "dull not device by coldness and delay" (t). Very frequently, indeed, as will be noticed on reference to the language used *arguendo* in the authorities,

(r) *Clough v. L. & N. W. Railway Co.*, *sup.*, at p. 35.

(s) *Lindsay Petroleum Co. v. Hurd*, *sup.*, at pp. 239, 240. Cp., as to the intervention of the *jus tertii*, the judgment of CHITTY, J., in *Re Murray, Dickson, and Murray* (1887), 57 L. T. 223.

(t) "Generally," says Bacon in his essay "Of Delays" (XXI), "it is good to commit the beginnings of all great actions to Argus with his hundred eyes; and the ends to Briarens with his hundred hands: first to watch, and then to speed."

“ laches ” and “ delay ”—like many other terms of equally convenient ambiguity in meaning and laxity in use, such as the expression “ arrangement,” when something has to be dressed up in the guise of a contract which is not so in law—serve to indicate a consciousness on the part of the advocate that he cannot support a case of affirmation or waiver, or whatever the affirmative defence may be, and must escape from rescission, if at all, like Venus in a mist, under cover of some such large and generous terminology, for the application of which to the case in question he may find specious warrant in not a few incautious deliverances of equity judges. Nor will he be without assistance from that unfailing resource of unsound reasoning, the “ maxims of the law,” of which an anthology might easily be extracted, in parallel columns, of so-called rules or principles capable of supporting both sides of any question. *Vigilantibus, non dormientibus, jus subvenit* is extensively relied upon in this connection by those who fail to see that this, like other maxims, is only true with the proper restrictions and qualifications, and, when extended beyond these limits, is demonstrably false. It is true when limited to acquiescence in the proper sense of the word, or to “ equitable estoppel,” as it is sometimes called, which doctrine, as has been said by a very profound jurist (u), “ applies in all cases where rights, once valid, are lost by delay, and the implied acquiescence from such delay,” that is to say, in all cases where inaction and standing by amounts either to a representation by conduct which induces another to alter his position to his prejudice, or to a license or encouragement to another to adopt or continue in a certain course of conduct, such license or encouragement being implied from the party’s refraining from exercising the right which he knows is his, and knows is being violated by a person who is expending money in the honest belief either that there is no such right, or that it is being waived. The maxim, however, has no application to cases of misrepresentation, and, if applied literally to such cases, is totally false. The law does not, and cannot, refuse its aid and countenance to the *dormiens*, if he wakes up and demands it before the other party, or any third person, has the right to insist that it shall be refused. He may have slept as long as Rip Van Winkle, but if nothing has happened affecting his title to relief during his slumber, that relief is not to be granted or withheld accordingly as he has slept for a short or a long time. On the other hand, if something has happened affecting his title, it does not signify how brief his nap may have been. If Achilles wakes up in time to beat the tortoise at the winning-post, the law has no business to inquire how long it was before he woke up. No doubt, lapse of time, without any attempt on the part of the representee to assert his rights, besides being a peril to him in the manner and to the extent already indicated, is also calculated to excite, even *in gremio judicis*, a certain human sympathy with the misrepresentor, at all events where his misrepresentation was innocent, and

(u) Story’s *Equity Jurisprudence*, vol. ii, § 1534.

a correspondingly critical attitude towards the slackness and laxity (which is all that the term “laches” means in point of etymology) exhibited by the representee in nursing a stale claim. “It has beautifully been remarked,” said Lord CAMPBELL, L.C. (x), “with respect to the emblem of Time, who is depicted as carrying a scythe and an hour-glass, that while with the one hand he cuts down the evidence which protects innocence, with the other he metes out the period when innocence can no longer be assailed.” There is a not unnatural tendency to support, if possible, the defence of one who, after many years, is charged with misrepresentation on *prima facie* plausible grounds, where, in the course of that period, the persons and documents by which, if the accusation had been made *dum fervebat opus*, he could have established the truth of his representation, may have perished or been lost or mislaid or destroyed, and in such cases the idea of an ethical period of limitation presents some attraction to the sternest and most unbending judicial mind. But the effect of delay not amounting to, or affording evidence of, or scope for, any of the defences referred to, cannot be put higher than this, even in the case of innocent misrepresentations; whilst, in any case where the misrepresentation was fraudulent, and where the representor, so far from being an object of commiseration, has enjoyed for the period of delay an entirely unmerited good fortune, this sympathetic attitude is absolutely out of place. “No time,” said the same Lord CAMPBELL, L.C., “will assure” such persons “in the enjoyment of their plunder, but their children’s children will be compelled in this court to restore it” (y).

324. The term “acquiescence,” in its proper sense, is an even more inappropriate and inexact description or title of any of the affirmative defences to proceedings for rescission than the expressions “laches” and “delay.” The meaning of “acquiescence” has been well stated by Lord COTTENHAM, L.C.: “if a party,” he says, “having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. This is the proper sense of the word acquiescence” (z). Acquiescence, in fact, is more than quiescence, which is all that is connoted by “delay” and “laches”; it is a quiescence under such circumstances as indicate an *assent* to, and encouragement and permission of, a course of conduct on the part of another. Manifestly, acquiescence has no possible meaning in relation to the right to avoid a contract for misrepresentation, except when used in the above sense as the equivalent of “affirmation,” as it sometimes is (a).

(x) At p. 617 of *Bright v. Legerton* (1860), 2 De G. F. & J. 606. Cp. *Lawrance v. Norreys* (1880), 15 App. Cas. 210, 219, 221, H. L.

(y) At p. 741 of *Charter v. Trevelyan* (1844), 11 Cl. & Fin. 714.

(z) *Leeds (Duke) v. Amherst (Earl)*, No. 1 (1846), 2 Ph. 117, at p. 123. Cp. the passage from Story, cited in note (u), *sup.*

(a) In *Sharpley v. Louth and East Coast Railway Co.* (1876), 2 C. D. 663, C. A., MALINS, V.-C., in the court below, though not the C. A., used “acquiescence” to denote conduct which was evidence of an election on the part of the representee to

SECT. 5. QUESTIONS OF LAW AND FACT IN PROCEEDINGS FOR RESCISSION.

325. As regards all those elements and ingredients which are common to both the two main types of proceeding founded on misrepresentation, it has already been pointed out which of the matters of controversy arising therein are questions of law, and which are issues of fact (*b*). The questions special to proceedings for rescission, whether arising on the consideration of the representee's case, or on those of any affirmative case set up by the representor, such as whether the representee has exercised his right of election by affirming the contract before the initiation of the proceedings, or by avoiding it, or at all,—whether he is in a position to restore the property in the same physical plight as that in which he received it,—whether, by his acts and conduct, he has evinced an intention to take all risks, waive all inquiry, or not to rely on the alleged or any representation, and the like,—are questions of fact, subject to these overriding rules,—that it is a question of law whether there is any evidence in support, or in contradiction, of any allegations of the nature indicated ; and also that, in case of any agreement said to be wholly contained or recorded in documents, or to depend on undisputed facts, it is a question of law whether the alleged agreement is, or is not, contained or recorded in, or to be implied or extracted from, such documents in their proper construction, or such undisputed facts (*c*). Further, any question as to the representee's capacity to restore rights having the same legal character and incidents as they possessed when they passed to him under the contract or transaction, is obviously a question of pure law (*d*).

SECT. 6. PARTIES TO PROCEEDINGS FOR RESCISSION.

326. The question of what persons are deemed in law to have been parties to the representation sued upon has already been discussed (*e*), as also has the question of what persons, other than the parties to the representation, may, or (in certain cases) must, be parties to an action for damages founded on misrepresentation (*f*). It remains to consider who, besides the parties to the representation, may or (in certain cases) must, be parties to proceedings for rescission (*g*).

affirm the contract, and of nothing else. It should be noted that it is possible for *the representee* to rely upon the doctrine of acquiescence, *in its proper sense*, as a means of defeating the representor's plea that he (the representee) has by his acts and conduct altered the character of the property passing under the contract: see § 308, and the case cited in note (*t*) thereto.

(*b*) See Ch. X, Sect. 4, *ante*.

(*c*) See, generally, Sect. 2, and Sect. 4, of this Chapter, *ante*, and the cases cited in the notes thereto respectively.

(*d*) See § 308, *ante*, and note (*r*) thereto. The rules stated in the text are the subject of Article 40 of the Code.

(*e*) See Ch. VIII, *ante*.

(*f*) See Ch. X, Sect. 5, *ante*.

(*g*) These questions are the subject of Article 41 of the Code. See, generally

Sub-sect. (1). The Persons entitled to initiate or maintain the Proceedings.

327. In cases of transmission or devolution, by act or operation of law, of a cause of action for rescission, by reason of the death, insolvency, infancy, or lunacy, of the representee (*h*), or in cases where the representee is a married woman (*i*), the rules as to the persons who, in right of the representee or his estate, are entitled to commence, or (as the case may be) continue, proceedings against the representor, are the same as those which govern actions of contract in general, and do not call for special treatment in this place. But to cases of devolution or assignment other than the above, there are two rules specially applicable, which require to be examined.

328. In the first place it is well settled that, where specific property is devised or conveyed or assigned from one to another, there pass with it all such equities to rescission as the person devising, conveying, or assigning was entitled to, when so doing. So long as the right is coupled with possession, physical or constructive (as by receipts of rents), the mere initiation or maintenance of an action in relation to *the property*, though proceedings for rescission may be involved in such litigation, is in no way obnoxious to the objections of champerty or maintenance (*k*). "An assignment of property is valid, even although that property may be incapable of being recovered without litigation" (*l*). As was said by Lord ROMILLY, M.R., in a judgment which has been repeatedly cited and approved, "the right of suit is a right incidental to the property conveyed," and also "incidental to each interest carved out of it"; therefore "any interest which, but for the previous deed, would have been sufficient to enable a person interested to ask this court to secure this property for the benefit of the persons interested therein, would, in my opinion, enable that person to ask this court to set aside the deed obtained by fraud, which, if valid, would have prejudiced or destroyed his interest in the property purporting to be conveyed to him" (*m*). Thus a man may devise, so as to defeat his heir, an equity to set aside a conveyance on the ground of fraud to the very person guilty of it, just as he can, with the like consequences to the heir, devise away from him any other equitable and devisable interest (*n*).

the various treatises on Parties, and Lord Halsbury's *Laws of England*, title "Actions," vol. i, pp. 17-22.

(*h*) See Williams on *Executors and Administrators*, Vaughan-Williams on *Bankruptcy*, Buckley on *Companies*, Simpson on *Infants*, and Archbold on *Lunacy*, respectively, and O. 16, of the R. S. C.

(*i*) See Lush on *Husband and Wife*, and Eversley on *Domestic Relations*, and O. 16 of the R. S. C.

(*k*) This principle was recognized by Lord ABINGER, C.B., at pp. 486, 487, and 499 of *Prosser v. Edwards* (1835), 1 Y. & C. 481, Eq. Exch., and applied in *Cockell v. Taylor* (1852), 15 Beav. 103, 116, 117. Cp. the non-disclosure case of *Wilson v. Short* (1847), 6 Hare, 366, *per* WIGRAM, V.-C., at pp. 376, 384.

(*l*) *Dawson v. Great Northern and City Railway Co.*, [1904] 1 K. B. 260, *per* COLLINS, M.R., at p. 271.

(*m*) *Dickinson v. Burrell* (1866), L. R. 1 Eq. 337, at p. 342.

(*n*) *Stump v. Gabey* (1852), 2 De G. M. & G. 632, *per* Lord ST. LEONARDS, L.C.

329. But, secondly, it is no less firmly established, on grounds of public policy, that a bare right or equity to rescind on the ground of misrepresentation, or on any other ground, divorced from any specific property or fund, is not saleable or assignable, for, as has been held over and over again, as, for instance, by Lord ELDON, L.C. (*o*), Lord ABINGER, C.B. (*p*), COLLINS, M.R. (*q*), and COZENS-HARDY, L.J. (*r*), all such sales and assignments of litigated titles savour of, if not actually constituting, champerty in the one case, and maintenance in the other. But a claim to recover on the principles of rescission, and on the ground of misrepresentation or concealment, a specific fund which is earmarked and can be traced, and which may properly be described as in equity the money of the claimant, or as an equitable debt, is not exceptionable on this ground (*s*), the fund in question being regarded as specific property within the meaning of the first rule. Hence it is that misfeasance claims against the delinquent directors and officers of a company have always been held the proper subject of assignment and sale, whether by private treaty (*t*) or public auction (*u*).

330. The procedure, by test action or otherwise, where several representees are seeking rescission against the same representor in respect of the same representation, is dealt with elsewhere (*x*).

Sub-sect. (2). The Persons Liable to the Proceedings.

331. The persons, other than the representor, against whom, in case of his death, insolvency, infancy, or lunacy, or where the representor is a

at pp. 630, 631. For an instance of a sale to the person against whom the relief would be obtainable, see *Re Park Gate Waggon Works Co.*, cited in note (*t*), *inf*.

(*o*) In *Wood v. Downes* (1811), 18 Ves. 120, at p. 125.

(*p*) In *Prosser v. Edwards*, *sup.*, at pp. 496, 500.

(*q*) In *Dawson v. Great Northern and City Railway Co.*, *sup.*, at pp. 270, 271: "a court of equity is as much bound as a court of common law by the rules relating to champerty and maintenance, and if an assignment of a chose in action is obnoxious to those rules, it is bad in equity no less than in law. An assignment of a mere right of litigation is bad."

(*r*) In *Fitzroy v. Cave*, [1905] 2 K. B. 364, C. A., at p. 371. "there are undoubtedly many choses in action which are not, and never were, assignable, either at law or in equity. A right to set aside a deed on the ground of fraud is a typical instance."

(*s*) See *Cockell v. Taylor*, *sup.*, where the distinction is drawn between an assignment of a naked right to sue, or a bare litigated claim, which would be bad, and (as was the case there) a claim to an interest in a specific fund actually lodged in court.

(*t*) As in *Re Park Gate Waggon Works Co.* (1881), 17 C. D. 234, C. A. (where, the liquidator having sold all the property of the company to a certain person, a misfeasance claim against delinquent officers of the company was held to be comprised therein, and the proper subject of sale, notwithstanding that the purchaser was the agent of these very officers, who accordingly on this ground obtained an injunction against the liquidator proceeding with the misfeasance claim against them, on this ground, though the order was made without prejudice to any application which the liquidator might make to set aside the deed of sale); and *Re Anglo-Austrian Printing and Publishing Union, Brabourne (Lord) v. Same*, [1895] 2 Ch. 891 n. (where a misfeasance claim was assigned to the debenture holders).

(*u*) As in *Wood v. Woodhouse and Rawson, United*, [1896] W. N. 4, where misfeasance claims were ordered by the court, in a debenture holder's action, to be put up for sale by auction.

(*x*) See Ch. XV, Sect. 2, Sub-s. (2), *post*.

married woman, proceedings for rescission may be initiated, continued, or maintained, are, ordinarily, those who, according to the rules as to parties applicable to actions of contract in general, would be so liable (y). But in cases of assignment by voluntary act of the parties, or in any case where neither a claim under the contract, nor the property the subject thereof, passes by mere operation of law, there are certain rules which in their application to proceedings for rescission demand attention.

332. Where the representor has assigned a mere chose in action (as distinguished from property in possession) which he has acquired under a contract or transaction voidable for misrepresentation as against him at the instance of the representee, the assignee, though taking in good faith, for value, and without notice, stands in no better position after the assignment than the assignor before it. No rule of law is better established, or more inflexibly applied, than the ancient equitable rule (z), now made part of the statutory law of the land, and equally applicable to all Divisions of the High Court (a), that the assignee of a chose in action takes subject to all equities which, before the assignment, were, and, but for the assignment, would continue to be, enforceable against the assignor; and amongst such recognized equities is the equity to avoid on the ground of misrepresentation.

333. On the other hand, where property in possession (physical or constructive) passes under the assignment to one who acquires it for value, without notice, and in good faith, or (to borrow a convenient phrase from the Bills of Exchange Act, 1882) to an assignee "in due course," no election to avoid on the ground of misrepresentation, or proceedings in rescission, which would have been available against the assignor, will be in the slightest degree effectual to take the property out of the hands of the assignee. Such election to avoid must have been in fact exercised by the representee, either in the form of a notice of repudiation, and that "resumption of his property" (in a legal sense) which is implied therefrom, or by the institution of proceedings for rescission, in which case the assignee is simply put in possession of that which it was not in the power of the assignor to

(y) See the same treatises and Order as are referred to in notes (h) and (i) to § 327, *ante*.

(z) See *Cockell v. Taylor*, *sup.* (per ROMILLY, M.R.). "the rule relative to the equities which attach to a chose in action has been discussed and established in many cases. It has not been disputed here, nor can it be doubted, that a purchaser of a chose in action does not stand in the situation of a purchaser of real estate for valuable consideration without notice of any prior title; but that the purchaser of a chose in action takes the thing bought subject to all the prior claims against it." In that case, accordingly, a mortgage of a charge upon a fund in court was declared void for fraudulent misrepresentation and pressure as against not only the mortgagee, but also sub-mortgagees who took without notice and for value; and *Davis v. Chanter* (1855), 3 W. R. 321 (where, a compromise having been made between five children, A., B., C., D., and E., and A. having proved that it had been brought about by the fraud of B., KINDERSLEY, V.-C., set it aside, not only as against the fraudulent B., but also as against the innocent C. and D., and also a purchaser without notice of E.'s interest and rights under the compromise, on the ground that the purchaser had thereby acquired a mere equitable chose in action).

(a) Judicature Act, 1873, s. 25, sub-s. (6).

bestow ; in other words he acquires nothing, for *nemo dat quod non habet*. But where there has been no such avoidance of the voidable contract before the assignment thereunder of any chose in possession, the assignee cannot be deprived of the property unless his acquisition of it was wanting in some one or more of the elements necessary to constitute what we have termed "due course," that is to say, unless (1) he gave no value, and was a mere donee or volunteer, or (2) took with notice, or (3) in bad faith (b).

334. That the property may be taken out of the hands of an assignee who is a mere volunteer, or the recipient of bounty, whether he acted in good faith and without notice or not, has been established from the earliest times. The rule is forcibly stated in a celebrated case (c), where the question arose whether the innocent donees of portions of the property acquired by imposition could retain what they had so been given, and where WILMOT, C.J., one of the Lords Commissioners of the Great Seal, delivered himself thus : "there is no pretence that Green's brother or his wife was party to any imposition, or had any due or undue influence over the plaintiff ; but does it follow from thence that they must keep the money ? No ; whoever receives it must take it tainted and infected with the undue influence and imposition of the person procuring the gift. His partitioning and cantoning it out amongst his relations and friends will not purify the gift and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet, if it comes through a corrupt, polluted channel, the obligation of restitution will follow it" (d). And in numerous subsequent decisions, both of misrepresentation and of undue influence, unconscionable dealing, and non-disclosure, this doctrine, which is common to all cases of imposition and oppression, has been consistently and rigorously applied (e). It is to be observed that, for this purpose, any person to whom property is assigned by operation of law, or by force of some statutory provision, such as a trustee in bankruptcy, is a volunteer and not a purchaser for value, and a representee may exercise as against him any right of avoidance or rescission (and thereby recover property otherwise distributable amongst the creditors) which he might have exercised against the bankrupt (f).

(b) See the definition of a "holder in due course" in the Bills of Exchange Act, 1882, s. 29.

(c) *Bridgman (or Bridgeman) v. Green* (1755), 2 Ves. Sr. 626 ; (1757) Wilmot's Opns. and Judgmts., 58. This case was decided by Lord HARDWICKE, L.C., in 1755, as reported in Vesey Sr. ; and, in 1757, it came before the Lords Commissioners of the Great Seal (WILLES, C.J., Sir SIDNEY STAFFORD SMYTHE, and WILMOT, C.J.), and it is the judgment of WILMOT, C.J., on this appeal or rehearing, which is reported in Wilmot's Opns. and Judgmts., *sup.*

(d) Wilmot's Opns. and Judgmts., 64.

(e) See *Huguenin v. Baseley* (1807), 14 Ves. 273, *per* Lord ELDON, L.C., at pp. 288-290, citing and approving WILMOT, C.J.'s, statement of the rule ; *Vaughan v. Vanderstegen*, *Gates's Case* (1854), 2 Drew. 363 ; 100 R. R. 173 ; *Same v. Same*, *Othwaite's Case* (1854), 2 Drew. 408 ; 100 R. R. 199 ; *Haygarth v. Wearing* (1871), L. R. 12 Eq. 320 ; and *Babcock v. Lawson* (1880), 5 Q. B. D. 284, C. A. The first of these was an undue influence case, with which compare a later case of this nature, *Morley v. Loughnan*, [1893] 1 Ch. 736 (*per* WRIGHT, J., at pp. 757, 758). The others were misrepresentation cases.

(f) See *Kennedy v. Green* (1834), 3 My. & K. 699 ; *Load v. Green* (1846), 15 M. &

335. Secondly, if the assignee had notice of the fact which gave the representee his equity to avoid the contract and resume the property, he cannot retain such property, though he gave value, and was not guilty of any intentional dishonesty or bad faith (*g*).

336. Lastly, though the assignee gave value and in fact had no express notice of the facts which rendered the contract voidable, if he acted in bad faith, that is to say, if with fraudulent deliberation he escaped notice of that which he abundantly suspected, again he is not permitted to retain the property (*h*).

337. The burden of proving that the assignee was not an assignee "in due course" is on the representee; there is no burden on the assignee of proving that he was. It has never been doubted that it is incumbent on the representee to show that the assignee gave no value for the property, or had notice of the facts in virtue of which the contract was voidable, but, until recently, there seems to have been some conflict of judicial opinion as to whether the onus of establishing good faith is not on the assignee. It has now, however, been decided by the Court of Appeal that this is not so, and that the representee must prove the assignee's absence of good faith, just as much as he must prove the absence of either of the two other elements, if he intends to rely on such absence, which are necessary to constitute "due course" (*i*). Whenever the representee has either not alleged, or,

W. 216; *Re Eastgate, Ex parte Ward*, [1905] 1 K. B. 645; and *Tilley v. Bowman*, [1910] 1 K. B. 745, 750.

(*g*) In *Sheffield (Earl of) v. London Joint Stock Bank* (1888), 13 App. Cas. 333, H. L., such notice was proved; on the other hand, in *London Joint Stock Bank v. Simmons*, [1892] A. C. 201, H. L., it was not proved.

(*h*) *Whitehorn Brothers v. Davison*, [1911] 1 K. B. 463, C. A., where, however, the alleged *mala fides* was not made out. The distinction between notice and bad faith is recognized by VAUGHAN WILLIAMS, L.J., at p. 476 in the passage cited in the next note.

(*i*) *Whitehorn Bros., v. Davison, sup.*, where the C. A. set aside the verdict obtained by the plaintiff in the court below, and entered judgment for the defendant, on the ground, *inter alia*, that it was for the plaintiff—the representee—to prove bad faith, as much as it was for him to prove absence of value or notice, and that the jury had been misdirected that it was for the defendant—the assignee of the property from the representor—to prove his good faith. The rule, and the reason for it, is stated with admirable lucidity by VAUGHAN WILLIAMS, L.J., at pp. 476, 477: "where you have a contract of sale which is voidable on the ground of fraud, or for any other reason, and before it is avoided by the seller, the buyer, as against whom it could have been avoided, has transferred the subject-matter of the contract to an innocent third person who has given value and has accepted the transfer without either knowledge of anything wrong, or any knowledge of such circumstances as might lead him to wish not to make any further inquiry lest he should find that there was something wrong, the contract cannot be avoided as against that person; and I am of opinion that the onus of proving that there are such circumstances as prevent the third person so purchasing from being such an innocent purchaser rests on the plaintiff who seeks to recover the subject-matter of the contract from him, and not on the defendant. . . . The very statement which occurs again and again that in such cases the contract is a voidable and not a void contract, *i.e.* that it is valid till avoided, seems to me to indicate that the onus for the purpose of avoiding it against the third person must lie on the person who is seeking to impeach that which up to that time is a valid contract. Common sense appears to me to point to the same conclusion." And, one may add, common fairness too. To take property out of the possession of another, a cause of action,—a legal justification,—must be shown. As against the representor, such justification consists in his misrepresentation; but as against a person who did not make or join in the misrepresentation, and who never had any contractual privity,

having alleged, has failed to prove, the absence of some one of these three elements, his claim against the assignee has been dismissed (*k*), unless he has been in a position to rely upon some estoppel against him (*l*), or has been able to show that there had never been any contract at all under which any property could pass to the assignee (*m*).

or relationship of any kind with the representee, it must be shown either that, by reason of notice or bad faith, it is morally right that the third person should suffer, or that, by reason of his being a mere volunteer or donee, he will not in fact suffer, or will not in fact suffer any injury which the law can recognize. Further, to put it in another way, a man in possession of property is presumed to be in innocent and lawful possession of it, until the contrary is shown. These aspects of the matter are insisted upon by BUCKLEY, L.J., at pp. 481, 482 (who there explains that the form in which the proviso to sect. 23 of the Sale of Goods Act, 1893, is expressed, though at first sight lending some countenance to the opposite contention, could not have been intended to revolutionize plain principles of evidence as to the *onus probandi* in such cases), and by KENNEDY, L.J., at p. 487.

(*k*) As in *London Joint Stock Bank v. Simmons*, *sup.*, where the plaintiff failed to prove notice; in *Truman v. Attenborough* (1910), 103 L. T. 218, a case arising out of the same kind of misrepresentation of the same representor as in *Whitehorn Brothers v. Davison*, *sup.*, where the representee relied on estoppel, and did not even allege either absence of value, or notice, or bad faith; and in *Whitehorn Brothers v. Davison*, *sup.*, where again the representee did not allege, or attempt to prove, any of the above, but insisted (wrongly, as the C. A. held) that it was for the defendant to prove his good faith.

(*l*) See *Truman v. Attenborough*, *sup.*, where, however, the estoppel was not made out, and compare some of the cases cited in the notes to § 348 in Ch. XII, Sect. 3, *post*.

(*m*) See §§ 256, 257, and 259 in Sect. 1, Sub-s. (4) of this Chapter, *ante*.

CHAPTER XII.

MISREPRESENTATION AS A DEFENCE OR INVALIDATING CAUSE.

338. MISREPRESENTATION operates as an absolver, as well as a dissolver, —an invalidating cause, no less than a cause of action. Though more frequently used as a sword, it may serve as a shield. Hitherto it has been considered in the former capacity. It remains to examine it in the latter.

SECT. 1. TO WHAT PROCEEDINGS MISREPRESENTATION IS A DEFENCE OR ANSWER.

339. Subject to the qualifications and conditions mentioned in the next Section, it may be stated broadly that, wherever a representee is in a position to claim, or obtain, rescission of any contract on the ground of misrepresentation, he is also in a position to set up, or make good, respectively, an answer on the same ground to any proceeding instituted by the representor against him under or in respect of such contract (*a*), whether the proceeding be for the direct, though not the specific, enforcement of the contract by recovery of a debt due thereunder (*b*), or for the indirect

(*a*) See Article 42 of the Code.

(*b*) Thus misrepresentation was successfully set up as an answer to the following claims or affirmative cases respectively, for the purpose of directly, though not specifically, enforcing contracts, in the following cases respectively:—*McCarthy v. Decaix* (1831), 2 Russ. & M. 614 (to a case of an agreement to renounce all claims under a marriage settlement, set up as an affirmative defence to an action to recover arrears of annuity thereunder: *per* LEACH, V.-C., at pp. 620–623); *Wainwright v. Bland* (1836), 1 M. & W. 32 (to a claim under a policy of life insurance); *Stone v. Compton* (1838), 5 Bing. N. C. 142 (to a claim on a promissory note); *Evans v. Edmonds* (1853), 13 C. B. 777 (to claim on covenant in deed); *Bannerman v. White* (1861), 10 C. B. (N. S.) 844 (to claim for price of hops); *Lee v. Jones* (1864), 17 C. B. (N. S.) 482 (to action on guarantee of fidelity); *Daves v. Harness* (1875), L. R. 10 C. P. 166 (to action on cheque); *Hirschfield v. L. B. & S. C. Railway Co.* (1876), 2 Q. B. D. 1 (to affirmative plea of release); *Eyre v. Smith* (1877), 2 C. P. D. 435 (to plea of liquidation by arrangement under the Bankruptcy Act, 1869, the plaintiff replied that the resolution had been obtained by fraud, and the reply was held good on demurrer); *Aaron's Reefs, Ltd. v. Twiss*, [1896] A. C. 273, H. L. (to action to recover calls, as debt, on forfeited shares); *Gordon v. Street*, [1899] 2 Q. B. 641, C. A. (to action on promissory note); and *Compton's Tube Co. v. Naylor*, [1900] 2 Ir. R. 1 (to action for calls on shares). In *Mallalieu v. Hodgson* (1850), 16 Q. B. 689, the plaintiff representee's replication to an affirmative plea of release failed, but only because both parties were shown to have combined in a scheme to defraud the other creditors. No reference has been here made to any insurance case other than *Wainwright v. Bland*, *sup.*, for the reason that, in most of the cases of this kind, the truth of all representations by the assured in answer to inquiries is, *by a term in the contract*, made the condition and basis of its validity.

enforcement of it by recovery of damages for breach (c), or for specific performance of its terms (d).

340. Misrepresentation may in such cases be pleaded and set up either by a defendant representee as a defence to any action or proceeding instituted by a plaintiff representor, or by a plaintiff representee as a reply or answer to any counter-claim, or affirmative case, pleaded or set up by a defendant representor (e), even when such counter-claim or affirmative case is itself one of misrepresentation, whereby it results that, in a sense, one misrepresentation is set off against another (f). It may be insisted on as an answer to applications as well as actions (g). It is immaterial whether the representee adds to his defence or answer a counter-claim for rescission or not (h).

(c) See *Wharton v. Lewis* (1824), 1 C. & P. 529, and *Foot v. Hayne* (1824), 1 C. & P. 545, two actions for damages for breach of promise of marriage, in both of which ABBOT, C.J., directed the jury that misrepresentation of the lady's circumstances and character would be a defence. So in *Canham v. Berry* (1855), 15 C. B. 597, a plea of misrepresentation to an action for damages for breach of an agreement to deliver possession of leasehold premises was held good on demurrer.

(d) The following are illustrations of successful answers, on the ground of misrepresentation, to claims or counter-claims for specific performance: *Cadman v. Horner* (1810), 18 Ves. 10; *Knatchbull v. Grueber* (1817), 3 Mer. 124; 17 R. R. 35; *Beaumont v. Dukes* (1822), Jacob 422; 23 R. R. 110; *Harris v. Kemble* (1831), 5 Bligh (N. S.) 730; *White v. Cudden* (1842), 8 Cl. & Fin. 766; *Brooke (Lord) v. Rountwaite* (1846), 5 Hare 298; *Shackleton v. Sutcliffe* (1847), 1 De G. & Sm. 609; *Reynell v. Sprye*, *Sprye v. Reynell* (1852), 1 De G. M. & G. 660; *Price v. Macaulay* (1852), 2 De G. M. & G. 339 (as to one of the two lots the subject of the contract); *Caballero v. Henty* (1874), 9 Ch. App. 447; *Redgrave v. Hurd* (1881), 20 C. D. 1, C. A.; *Smith v. Land and House Property Corporation* (1884), 28 C. D. 7, C. A.; *Archer v. Stone* (1898), 78 L. T. 34; and *Jacobs v. Revell*, [1900] 2 Ch. 858.

(e) The following are instances of the misrepresentation being set up by a plaintiff as an answer to a counter-claim or counter-case of contract set up by the defendant: *McCarthy v. Decaix*, *sup.*; *Mallakieu v. Hodgson*, *sup.*; *Nelson v. Stocker* (1859), 4 De G. & J. 458; *Hirschfeld v. L. B. & S. C. Railway Co.*, *sup.*; *Eyre v. Smith*, *sup.*; and *Jacobs v. Revell*, *sup.* In *Reynell v. Sprye*, *Sprye v. Reynell*, *sup.*, the defence was successfully pleaded to Sprye's cross-bill (which would now be set up in the form of a counter-claim) for specific performance of the contract which it was the object (attained) of Reynell's original bill to rescind.

(f) This is illustrated by the curious case of *Greenfield v. Edwards* (1865), 11 L. T. 663. There the plaintiff sued for an injunction to restrain the defendant from acting contrary to the terms of a mortgage deed. The defendant set up and proved misrepresentation by the plaintiff in the recitals and frame of the deed, but it was shown that the defendant was also guilty of misrepresentation in relation to this deed: whereupon STUART, V.C., thought that, in this sense, the defendant's misrepresentation might be set off against the plaintiff's, and neutralized it, and he accordingly granted the injunction prayed. The doctrine, however, of setting off one tort against another seems a somewhat dangerous one. As applied to a case of defamation,—*Kelly v. Sherlock* (1866), L. R. 1 Q. B. 686,—it was emphatically dissented from by BLACKBURN, J. (at p. 698), though it was also said that the jury were justified in taking the cross-libs into account in reduction of damages.

(g) As, for instance, by way of answer to a claim in respect of a sale by direction of the court in the administration of an estate; or to an application to settle the representee's name on the list of contributories of a company; or to a summons under O. XIV, as in *Re General Railway Syndicate*, *Whiteley's case*, [1900] 1 Ch. 365, C. A.

(h) Such a counterclaim was added in *Redgrave v. Hurd*, *sup.*, *Smith v. Land and House Property Corporation*, *sup.*, *Components Tube Co. v. Naylor*, [1900] 2 Ir. R. 1, and, though unsuccessfully, in *Shepherd v. Croft*, [1911] 1 Ch. 521.

SECT. 2. EXTENT OF APPLICABILITY OF THE RULES RELATING
TO PROCEEDINGS FOR RESCISSION.

341. With the two exceptions mentioned below (*i*), the representee who relies upon misrepresentation as a defence or answer to proceedings instituted, or an affirmative case set up, by the representor, must allege and prove precisely the same facts and matters as those which the representee who relies upon misrepresentation as a ground for rescission is required to allege and prove (*k*), and the evidence which is on the one hand necessary, and, on the other, sufficient, for the latter purpose is necessary and sufficient respectively for the former (*l*). Further, all such evidence as is essential and adequate to sustain any of the recognized affirmative pleas to proceedings for relief (*m*), is equally essential and adequate to support a reply or answer to any case of misrepresentation raised by way of defence to an action on the contract (*n*).

(*i*) In §§ 342 and 344, *inf.* respectively.

(*k*) As to the *alleganda et probanda* in proceedings for rescission, see Ch. XI, Sect. 2, *ante*.

(*l*) This proposition is stated in Article 43 of the Code. The authorities are:—as to the general identity of the elements of allegation and proof in the two classes of case, *United Shoe Machinery Co. of Canada v. Brunet*, [1909] A. C. 330, P. C. (at p. 338); as to particular elements essential in rescission which have been deemed equally so in a defence, *Nock v. Newman* (1832), 1 L. J. (N. S.) (CH.), 175; 36 R. R. 436 (question of who is deemed the representor), *Burnes v. Pennell* (1849), 2 H. L. C. 497 (questions of materiality and inducement, *per* Lord CAMPBELL at pp. 522, 523, and Lord BROUGHAM at pp. 529–533), and *Bentley v. Black* (1893), 9 T. L. R. 580, C. A. (questions of falsity, and whether alleged representor was so in fact). On the other hand, that it is as unnecessary to prove fraud for the purpose of the defence as it is for the purposes of rescission, as to which see Ch. XI, Sect. 1, Sub-s. (2), *ante*, is clear from *Baunerman v. White* (1861), 10 C. B. (N. S.) 844, and *Redgrave v. Hurd* (1881), 20 C. D. 1, C. A. (*per* JESSEL, M.R., at p. 12). That, where fraud is alleged, though unnecessarily, in the defence, the representee is as much bound to give particulars, as when he is making similarly unnecessary allegations as the *actor* in proceedings for rescission, is illustrated by some of the cases cited in the notes to Ch. XV, Sect. 2, Sub-s. (1), *post*. As to the irrelevance in the one class of case as much as in the other—see Ch. XI, Sect. 1, Sub-s. (3), *ante*, as to actions for rescission—of the question whether the representee was likely to benefit more by repudiating, than by adhering to the contract, or was reasonable in preferring the former course to the latter, see *Knatchbull v. Grueber* (1815), 1 Madd. 153 (*per* PLUMER, V.-C., at p. 167), and, on appeal (1817), 3 Mer. 124 (*per* Lord ELDON, L.C., at p. 146); *Brooke (Lord) v. Rounthwaite* (1846), 5 Hare 298 (*per* WIGRAM, V.-C., at pp. 302, 303); *Madeley v. Booth* (1849), 2 De G. & Sm. 718 (*per* KNIGHT-BRUCE, V.-C., at p. 722); *Ayles v. Cox* (1852), 16 Beav. 23 (*per* ROMILLY, M.R., at pp. 24, 25); and *Denny v. Hancock* (1870), 6 Ch. App. 1 (*per* JAMES, L.J., at p. 10).

(*m*) These affirmative pleas, six in number, are dealt with in the first six subsections respectively of Ch. XI, Sect. 4, *ante*.

(*n*) As to the knowledge of the representee, and agreement to waive inquiry, etc., see *Nelson v. Stocker* (1859), 4 De G. & J. 458, and some other of the cases cited in the notes to Ch. X, Sect. 2, Sub-ss. (1) and (2), respectively, *ante*. As to the identity of the principles applicable to the two classes of case where the representor sets up an express condition to forego rescission, with or without compensation as a substitute, as mentioned in Ch. XI, Sect. 4, Sub-s. (3), *ante*, compare with the cases there cited, the following: *White v. Cudden* (1842), 8 Cl. & Fin. 766; *Shackleton v. Sutcliffe* (1847), 1 De G. & Sm. 609 (*per* KNIGHT-BRUCE, V.-C., at pp. 620–623: here the plaintiff's misdescription of the premises (impliedly) as unincumbered, and as fit for "building purposes," etc., was deemed both substantial, and also "consciously" made; the answer, therefore, founded on the condition, to the defence of misrepresentation, failed); *Price v. Macaulay* (1852), 2 De G. M. & G. 339 (where the condition

342. The first of the abovementioned exceptions applies to those cases only where misrepresentation is set up as an answer to a claim of specific performance. In such cases it is not always essential to prove as much as would be required if the representee were suing for rescission. "The considerations which induce a court to rescind any contract, and the considerations which induce a court of equity to decline to enforce specific performance, are by no means the same" (o). The reason for this divergence in practice will be apparent from a consideration of the essential distinction between an action for the specific performance of a contract, and an action or proceeding for its enforcement by other means, whether direct (as for the recovery of money due thereunder), or indirect (as where pecuniary damages for the breach thereof are claimed). In the latter class of proceedings, the party is entitled (if his cause of action is established) to the relief he claims *ex debito justitiæ*; whence it follows that the other party can only invalidate this absolute title by strict proof of all facts required to negative the validity of the contract itself, in other words, of everything which it would be incumbent on him to establish in an action to rescind the contract; whereas, specific performance being

relied upon by the plaintiff was held sufficient to defeat the defence as to one of the two lots in question, but not as to the other); *Ayles v. Cox, sup.*; *Re Fauccett and Holmes* (1889), 42 C. D. 150, C. A. (where the representor plaintiff failed); *Re Brewer and Hankin's Contract* (1899), 80 L. T. 127, C. A. (where the representor plaintiff succeeded); *Re Puckett and Smith's Contract*, [1902] 2 Ch. 258, C. A. (where the representor plaintiff failed); and *Shepherd v. Croft*, [1911] 1 Ch. 521 (where the representor plaintiff succeeded). As to affirmation being an answer in both classes of case, see *Clough v. London and North Western Railway Co.* (1871), L. R. 7 Exch. 26, Exch. Ch. (where it was held that for purposes of an answer to a defence as well as to a claim of rescission, no affirmation is established in the absence of proof of complete and exact knowledge on the part of the representee, and where, at pp. 33 and 35, it was also held, impliedly, that it is not for the representee to prove previous acts in pais amounting to avoidance, but for the representor to prove previous acts amounting to affirmation, and that mere delay, as in cases where rescission is sought—see Ch. XI, Sect. 4, Sub-s. (7)—is, *per se*, not necessarily of any significance in this regard); *Wakefield v. Normanton Local Board* (1881), 44 L. T. 697, C. A. (where the plaintiff representor failed to prove that the defendant representees had knowledge when they were supposed to have affirmed); *Redgrave v. Hurd, sup.* (where JESSEL, M.R.'s, observations, at p. 13, as to the unimportance of delay *in itself*, applied equally to the defence set up by the representee and to his counter-claim for rescission); *Gordon v. Street*, [1899] 2 Q. B. 641, C. A. (*per* A. L. SMITH, L.J., as to delay, at pp. 650, 651); *Hemming v. Sceptre Life Association*, [1905] 1 Ch. 365 (where the plaintiff representor succeeded in proving the affirmation: *per* KEKEWICH, J., at pp. 369, 370); and *United Shoe Machinery Co. of Canada v. Brunet*, [1909] A. C. 330, P. C. (the like: see p. 339). As to the representor's incapacity to make specific restitution being an answer to an affirmative case of misrepresentation, no less than to a claim for rescission on that ground, see *Harris v. Kemble* (1831), 5 Bligh (N. S.) 730 (where the representee who set up misrepresentation as a plea to an action for the specific performance of an agreement to let a theatre, was met by the allegation that he had been two years in possession of the theatre and had made alterations in it, and in its management; but, whilst recognizing that this would have been an answer if it could be shown that thereby the defendant representee had rendered himself unable to restore the subject of the contract substantially as he received it, Lord LYNDBURST, L.C., at p. 752, held that it was not so shown in that case); and *Urquhart v. Macpherson* (1878), 3 App. Cas. 831, P. C. (where it was the plaintiff who set up misrepresentation as a replication to the defendant's affirmative plea of release, and was met by allegation, and in this case, proof, that he—the plaintiff—was unable to make restitution of the property *in specie*).

(o) *Re Banister* (1879), 12 C. D. 131, C. A., *per* JESSEL, M.R., at p. 142.

a particular form of equitable remedy which it is within the discretion of the court to grant, or to refuse either wholly, or except upon such terms and conditions as may appear in the circumstances of the particular case just and convenient, less evidence of questionable or unfair dealing will induce the court to decline the exercise of the discretionary jurisdiction thus invoked, and to withhold from the representor a form of remedy which is, in a sense, almost an indulgence, than will induce it to adjudge and declare, at the instance of the representee, that the contract is wholly and for all purposes void. Or, inverting the proposition, more evidence of good faith on the part of the representor is required to entitle him to the special relief, where misrepresentation is suggested by the representee, than where the ordinary remedies only are in question, and, if “upon the evidence, the plaintiff”—in a suit for specific performance—“has been guilty of a degree of misrepresentation, operating to a certain, though a small, extent, that misrepresentation disqualifies him from calling for the aid of a court of equity. . . . He must, to entitle him to relief, be liable to *no* imputation in the transaction,” and such a case is to be sharply distinguished from “a case where the court is called upon to rescind an agreement . . . which would admit of a different consideration” (*p*). “In all applications to the court involving the exercise of that discretion which the court invariably does exercise in ordering or refusing specific performance, it is necessary not to confound the principle or rules by which contracts are interpreted with the principles or rules which guide the court in enforcing or declining to enforce specific performance” (*q*). Nor is this rule in the slightest degree unjust to the representor, because he is not being deprived of all possible relief for ever, as he is when rescission is decreed against him, but he is still at liberty to proceed against the representee by way of alternative claim for damages (*r*), from which claim the representee cannot escape by proving less than what is essential to prove in a claim to rescind; and thus the representee, though his burden of proof may be less, obtains a correspondingly less complete measure of relief when he has discharged that burden. Moreover, it is always open to the court, in a proper case, instead of refusing to grant specific performance on any terms, to refuse it only in the event of the representor’s declining to make pecuniary compensation by abatement of price, or allowance, specified or to be assessed, or to submit to any other terms which may be deemed equitable (*s*). The representor in such cases is given an option

(*p*) *Cadman v. Horner* (1810), 18 Ves. 10, *per* GRANT, M.R., at pp. 11, 12.

(*q*) *Re Terry and White’s Contract* (1886), 32 C. D. 14, C. A., *per* LINDLEY, L.J., at p. 27.

(*r*) Which is the modern practice: in earlier times, the party was remitted to his remedy at law.

(*s*) Thus specific performance was only granted on the terms of compensation, etc., in the following cases where misrepresentation was established: *Scott v. Hanson* (1829), 1 Russ. & M. 128 (by Lord ELDON, L.C.); *King v. Wilson* (1843), 6 Beav. 124 (*per* Lord LANGDALE, M.R., at pp. 128, 129); and *Hughes v. Jones* (1861), 3 De G. F. & J. 307 (*per* KNIGHT-BRUCE and TURNER, LL.JJ., who ordered a reference to ascertain the amount and terms of the compensation. Of course no reference is made

of obtaining equity on doing equity, which is the fundamental condition of all discretionary relief. It must not be supposed, however, that he has an *absolute right* to specific performance with an abatement or an allowance. Nor, on the other hand, can the representee claim, as of right, that abatement shall accompany the order for specific performance, unless he can point to an express term in the contract to that effect, though he might resist the representee's claim to specific performance without such abatement (*t*). Where it appears to the court that the case is not one for a qualified refusal, or a conditional grant, of relief, specific performance is refused absolutely, or granted absolutely, as the case may be (*u*).

343. It should be noted that, though it may (having regard to the above rules of practice) be justifiable and prudent in the representee to remain on the defensive where there is a doubt whether the evidence available is sufficient for rescission, it is by no means wise to do so, where there is no such doubt; for, generally speaking, a representee who comes promptly to the court to annul a contract procured by misrepresentation before the actual accrual of liability thereunder has a better equity to relief than if he waits to be sued by the representor on such accrual (*x*). This observation, of course, does not apply to a case where the contract has been put an end to by the representor, and where, therefore, the representee cannot be blamed for awaiting the enemy's attack (*y*); indeed, in such a case, it would seem illogical to apply for rescission of that which *ex hypothesi* does not exist (*z*).

344. The second of the exceptions referred to relates to the question of alleging and proving a previous repudiation, or at all events non-recognition, of the contract. Where the representee is suing for rescission, there is no burden on him either of allegation or proof as regards this

in the text to the class of case referred to in Ch. XI, Sect. 4, Sub-s. (3), where compensation is a term of the contract.

(*t*) This was decided in *Cordingley v. Cheeseborough* (1862), 4 De G. F. & J. 379 (per STUART, V.-C., at pp. 384-389), and *Re Terry and White's Contract* (1886), 32 C. D. 14, C. A. (per LINDLEY, L.J., at pp. 30, 31, citing *Cordingley v. Cheeseborough* with approval).

(*u*) See *Knatchbull v. Krueger*, cited at the end of note (*l*) to § 341, *ante*; *Beaumont v. Dukes* (1822), Jacob 422; 23 R. R. 110 (per PLUMER, M.R., at p. 426: "it must stand or fall to the full extent; we cannot cut down the price, and say how much would have been given if this had not been done"); *White v. Cudden* (1842), 8 Cl. & Fin. 766 (at pp. 786, 792-794); and *Brooke (Lord) v. Rounthwaite* (1846), 5 Hare 298, per WIGRAM, V.-C., who, at pp. 303-305, pointed out that it was impossible to estimate the compensation, there being no materials for that purpose before the court, and he accordingly was compelled to dismiss the bill, though the defendant himself was anxious to submit to a decree with compensation. In such circumstances, it is a case of either an unqualified grant or an unqualified refusal of performance *in specie*, as *Portia* decided in *Shylock v. Antonio* ("Thou shalt have nothing but the forfeiture, To be so taken at thy peril, Jew").

(*x*) *Fenn v. Craig* (1838), 3 Y. & C. (EXCH.) 216, per ALDERSON, B., at p. 222.

(*y*) *Aaron's Reefs, Ltd. v. Twiss*, [1896] A. C. 273, H. L., per Lord MACNAGHTEN at p. 293. See also the observations of Lord WATSON, at p. 291, who seems to think that, even apart from such special circumstances, a representee who is defendant *in all cases* stands in a somewhat more favourable position, as regards the quantum of proof, than a representee who is suing for rescission. But this view, if it was intended, is clearly not in accordance with principle or authority.

(*z*) See Ch. XI, Sect. 2, § 261, *ante*.

question (a): But it has been held in several cases that, where the representee is defending an action or proceeding on the contract, whatever form that action or proceeding may assume, it is incumbent on him both to allege and prove that, since discovery of the truth, he has repudiated the contract, and has taken no benefit, exercised no right, made no claim, and recognized no interest or liability, under or in respect of it. A plea which contains averments to the above effect is good (b); a plea which fails to satisfy these requirements is bad (c); the reason being that merely to assert in a defence that the contract was induced by misrepresentation is to confess, without avoiding (d), whereas, in proceedings for rescission, the writ itself is the avoidance (e). And, having so pleaded, the onus is on the representee to prove the allegations so contained in his plea (f).

SECT. 3. WHERE THE DEFENCE IS AVAILABLE AGAINST ASSIGNEES OF PROPERTY OR RIGHTS UNDER A CONTRACT PROCURED BY MISREPRESENTATION.

345. Where the representee is being sued, not by the representor but by a person who claims to be the assignee from him of property

(a) *Ibid.*, § 267, *ante*.

(b) As in *Bulch-y-Plwm Lead Mining Co. v. Baynes* (1867), L. R. 2 Exch. 324.

(c) See *Deposit Life Assurance Co. v. Ayscough* (1856), 6 E. & B. 761 (which was an action for calls in the then statutory form against the defendant "as holder" of certain shares: plea, that defendant was induced to become the holder by the misrepresentation of the plaintiffs. Held bad on demurrer, because it admitted that the defendant was such a holder, without going on to aver a previous disaffirmance or repudiation: *per* Lord CAMPBELL, C.J., at p. 763, contrasting the cases, such as infancy, where the contract is void *ab initio*, and not voidable merely, and where, therefore, it is enough to allege the bare fact of infancy: see also what is said by COLERIDGE, J., at pp. 763, 764, and COMPTON, J., at p. 764); *Meldon v. Lawless* (1870), 18 W. R. 261 (an Irish case, where to a claim for rent, the defendant pleaded that the lease had been obtained by misrepresentation, but, since he did not allege repudiation, or deny that he had taken possession of the premises, the plea was held bad); *Anderson v. Costello* (1871), 19 W. R. 628 (another Irish case where, to an action for breach of a contract of indemnity, a similarly defective plea was pleaded, with a similar result); and *Daves v. Harness* (1875), L. R. 10 C. P. 166 (where, to an action on a cheque, the defendant pleaded that the cheque was for the price of a business the profits of which had been misrepresented by the plaintiff, and it was held that, after verdict, the plea must be taken to have included an allegation that the defendant had disaffirmed the contract, *because otherwise it would have been bad*. In *Aaron's Reefs, Ltd. v. Twiss*, [1896] A. C. 273, H. L., the defence merely alleged misrepresentation, but the contract in respect of which the action was brought had been put an end to by forfeiture of the shares the subject thereof, so that from that time there had been nothing to repudiate: consequently the plea was not deemed to be defective as, but for this circumstance, it might have been: see the observations of Lord HALSBURY, L.C., at pp. 277-279, who refers to the decision of *Deposit Life Assurance Co. v. Ayscough, sup.*, without any disapproval.

(d) See the case last cited, and *Meldon v. Lawless*, and *Daves v. Harness, sup.*

(e) See § 267 in Ch. XI, Sect. 2, *ante*.

(f) See *Daves v. Harness, sup.* (*per* BRETT, J., at p. 167, and GROVE, J., at p. 168); and *United Shoe Machinery Co. of Canada v. Brunet*, [1909] A. C. 330, P. C. (at p. 338). In *Aaron's Reefs, Ltd. v. Twiss, sup.*, for the reasons above given, the onus was considered rather to be on the representor company to prove affirmation, than on the representee shareholder, whose shares had been forfeited, to prove a previous repudiation, which would have been an idle and illogical proceeding, and as "there was no evidence, or contention, that the defendant had adhered to the contract" (*per* Lord HALSBURY, L.C., *ubi sup.*), his defence succeeded, and the claim failed.

under a contract or transaction voidable on the ground of misrepresentation as against the representor, such third person not being one who is suing merely in right of the representor or his estate (*g*), the determination of the question of the validity or invalidity of the defence depends upon whether the property assigned is a chose in action, and, if so, whether it is negotiable or not, or a chose in possession (*h*). The general principle applicable alike to all three classes of property is that the assignor transfers what he has acquired and nothing beyond; if he has a limited or defeasible interest, he can only transfer an interest subject to the same limitations, or liable to be defeated by the same events; if he has no title at all, he can confer none; *nemo dat quod non habet* (*i*). The different consequences which result from the application of this governing principle to assignments of the different kinds of property abovementioned have already been dealt with in discussing the right of the representee to recover property from one who has taken an assignment thereof from the representor under a contract voidable as against the representor (*k*). The rules there expounded apply *mutatis mutandis*, in most respects, to the case of a representee who is resisting the claim of such an assignee to recover the assigned property as much as to the case of a representee who seeks to recover the assigned property from the assignee.

346. Thus, as regards choses in action (*l*), the general rule is that the assignee takes subject to all equities which, until the assignment, were and, but for the assignment would continue to be, available against the assignor, and amongst such equities is the equity to rescind the contract for misrepresentation. Consequently, where a contract has been procured by this means, the representee has as good a defence against an assignee from the representor of a bare right to sue in respect thereof, as he had against the representor himself (*m*), which right of defence he retains after the assignment unless and until he so conducts himself in relation to the assignee as to give him an independent affirmative answer to the plea (*n*).

(*g*) Such as an executor or administrator, or a trustee in bankruptcy, or a guardian *ad litem*, or committee, or next friend, or husband, in cases of the death, insolvency, lunacy, or infancy, of the representor, and the like, as to which see the various treatises referred to in notes (*h*) and (*i*) to § 327, *ante*.

(*h*) See Article 43 of the Code.

(*i*) See, for a clear general statement of the principles applicable to the three classes of assignment respectively, *Crouch v. Credit Foncier of England* (1873), L. R. 8 Q. B. 374 (at pp. 380, 381); *Colonial Bank v. Cady and Williams*, [1890] 15 A. C. 267, H. L. (*per* Lord HERSCHELL at p. 283); and *London Joint Stock Bank v. Simmons*, [1892] A. C. 201, H. L. (*per* Lord HERSCHELL at p. 215).

(*k*) In Ch. XI, Sect. 6, Sub-s. (2), *ante*.

(*l*) As to what "chose in action" means and includes, see Lord Halsbury's *Laws of England*, title "Choses in Action," vol. iv, pp. 360-365.

(*m*) See *Cory v. Gertcken* (1816), 2 Madd. 40; 17 R. R. 180 (*per* PLUMER, V.-C., at p. 51); *Wakefield and Burnley Banking Co. v. Normanton Local Board* (1881), 44 L. T. 697, C. A. (*per* BRAMWELL, L.J., at p. 699); and Lord Halsbury's *Laws of England*, title "Choses in Action," vol. iv, pp. 386-391. Cp. § 332, *sup.*, and the cases cited in the notes thereto, where the same principle is applied to actions by the representee to rescind the contract as against such an assignee.

(*n*) See the observations of LUSH, L.J., at p. 700 of the case last cited. The answers to the plea which the assignee may thus set up against the representee on

347. There is, however, a well-established exception to the rule last stated in the case of negotiable instruments, whether made so or recognized as such by statute (*o*), as, for instance, the Bills of Exchange Act, 1882 (*p*), and the Bills of Lading Act, 1855 (*q*), or by the custom of merchants (*r*). In such cases the assignee is *primâ facie* free from all personal equities existing as between his assignor and the representee, and is presumed, until the contrary is shown, to have acquired, and to hold, the instrument "in due course," that is to say, for value, without notice, and in good faith; and the onus is therefore on the representee of showing, not only the misrepresentation of the assignor, but also the fact that the assignee acquired his alleged title to the instrument otherwise than in due course (*s*). It is enacted, however, with reference to bills of exchange, that "if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with" (*inter alia*) "fraud"—which would cover fraudulent misrepresentation—"the burden of proof is shifted unless and until the holder proves that, subsequent to the alleged fraud . . . value has in good faith been given for the bill" (*t*), which means that both value and good faith must be established, and that value without *bona fides* is as inefficacious to discharge the full burden imposed on the holder as *bona fides* without value (*u*). The above enactment, which is expressed to relate to bills only, is applied by other sections of the statute to cheques, and, with the necessary modifications, to promissory notes (*x*), also. If the instrument comes to the hands of the holder when overdue, or after dishonour, or in a form which shows irregularity on its face, the above rules have no application, and the holder is in the position of any other assignee of a chose in action (*y*).

348. Where the thing assigned is a thing in possession, physical or constructive (as, for instance, by receipt of rents and profits), whether it be land, or chattels, there is no presumption whatever against the assignee, or in favour of the representee, for the purposes the ground of the representee's acts and conduct subsequent to the assignment are those specified in Ch. XI, Sect. 4, Sub-ss. (4) and (5), *ante*.

(*o*) See Lord Halsbury's *Laws of England*, title "Choses in Action," vol. iv, pp. 393-397.

(*p*) 45 & 46 Vict. c. 61. See Chalmers' *Bills of Exchange*.

(*q*) 18 & 19 Vict. c. 111. See Carver's *Carriage of Goods by Sea*, and *Pease v. Gloahec* (1866), L. R. 1 P. C. 219.

(*r*) There are two marks of an instrument recognized as negotiable by the law merchant: (1) it must pass from hand to hand by delivery, (2) with the intention and effect of conferring a right to sue thereon: see *Crouch v. Credit Foncier of England* (1873), L. R. 8 Q. B. 374 (*per* BLACKBURN, J., delivering the judgment of the court at pp. 381, 382). As to what documents are comprised within the class of instruments negotiable by mercantile custom, see Lord Halsbury's *Laws of England*, title "Bills of Exchange," etc., vol. ii, pp. 564-570; *Sheffield (Earl) v. London Joint Stock Bank* (1888), 13 App. Cas. 333, H. L.; and *London Joint Stock Bank v. Simmons*, [1892] A. C. 201, H. L.

(*s*) See, as regards bills of exchange, etc., sects. 29, 30, and 38 (2), of the Bills of Exchange Act, 1882.

(*t*) Sect. 30 (2) of the same Act.

(*u*) *Tatam v. Haslar* (1889), 23 Q. B. D. 345, Div. Ct.

(*x*) See sects. 73 and 89 (1), respectively, of the Act of 1882.

(*y*) *Ibid.*, sects. 29 and 36.

of a defence founded on misrepresentation, when the representee is seeking to retain the property against the assignee, any more than there is for the purposes of a claim so founded, when the representee is actively asserting his right to take it out of such assignee's possession (z). In the one class of case, as much as in the other, the representee, having first established such facts as would amount to a good defence on the ground of misrepresentation against the representor, if such representor were suing, must go on to show, if he can, one of three things: (i) that he actually avoided the contract before the assignment (a); or (ii) that the assignee was a mere donee or volunteer (b); or (iii) that the assignee acted in bad faith, or with notice of the circumstances rendering the contract voidable (c). Proof of any one of these three matters is sufficient, and such as to make it unnecessary to consider the others (d). In the first case, the assignee acquires title from that which was a nullity at the date of assignment; in the second, he has purchased no right to consideration, and, therefore, will suffer no *damnum* which the law can recognize, in handing over that which came to him as a mere gift or windfall; in the third, he will suffer a *damnum*, but no *injuria*, because he will thereby be most righteously punished for direct or constructive complicity in the very wrongdoing of which the representee has a right to complain.

349. If the representee, though failing to make his plea good on the theory of the contract being voidable, is in the fortunate position of being

(z) As to which, see §§ 333-336, *ante*.

(a) In the following cases there had been no such avoidance, and the representee's defence failed on that ground: *White v. Garden* (1851), 10 C. B. 919; *Pease v. Gloahec*, *sup.* (at p. 229: "so long as the bill of lading remained with the parties who had fraudulently obtained it, the vendors who had been cheated out of the possession might have reclaimed and recovered it. But the moment it passed into the hands of Pease & Co., to whom it was pledged and indorsed for valuable consideration without notice, the right of the vendors to follow it was taken away"); and *cp.* § 333, *ante*, and the cases there cited.

(b) *Cp.* § 334, *ante*, and the cases cited in the notes thereto.

(c) This was established by the defendants in *Clough v. L. & N. W. Railway Co.* (1871), L. R. 7 Exch. 26, Exch. Ch. *Cp.* §§ 335, 336, *ante*, and the cases cited in the notes to those paragraphs.

(d) Thus in *Clough v. L. & N. W. Railway Co.*, *sup.*, the jury expressly found that value had been given, but also found that the assignee had given it in bad faith, whereupon the mere giving of value went for nothing, and so also did the fact that the defendants had not avoided the contract before the assignment, or even before they were sued, on which latter circumstance the plaintiff attempted to found an argument, which was effectually disposed of by the Exchequer Chamber at p. 33 ("there is a further objection to the plea as a plea at law, that the rescission came after the plaintiff had a vested cause of action against the L. & N. W. Railway Co., and that it could not operate to defeat that vested cause of action by relation," but "it is clear that as a court of equity interferes on the principle of granting relief to the defrauded party, from whom the fraudulent party against conscience seeks to obtain the fruits of his fraud, no such point could arise on a plea pleaded upon equitable grounds," as the plea before the court was, and as every plea now may be). That the burden is on the representee of proving bad faith, where it is relied upon in support of the plea, notwithstanding the somewhat ambiguous language of sect. 23 of the Sale of Goods Act, 1893, as well as that of establishing any of the other matters referred to in the text, when relied upon for that purpose, is now settled by the decision in *Whitehorn Brothers v. Davison*, [1911] 1 K. B. 463, C. A., as to which see note (i) to § 337, *ante*, and see, generally, on the question of the burden of proof, that paragraph and the notes thereto.

able to establish either by his own evidence, or by admissions elicited in cross-examination at the trial, that the contract is and always was an actual nullity, so that no property or rights whatsoever could have passed thereunder, on the ground that his execution of the instrument containing it was procured by misrepresentation of its nature, description, or class (*e*), or on the ground of a misstatement of the representor's identity with, or relation to the alleged contractor (*f*), then, as has already been pointed out (*g*), no further onus rests upon him of any kind, and he succeeds, not because of his right to avoid, or to ask the court to treat as avoided, a contract which was once valid, but because there never was any contract at all which required to be avoided (*h*). It must not be forgotten, however, that even where the representee has proved that no contract was ever made, it may appear that the representee by his acts and conduct has estopped himself from setting up, as against the assignee, the plea (*i*) of *non est factum* (*k*), or *error personæ* (*l*), as the case may be. It has, indeed, been argued that the negligence of the representee, not being illiterate or blind, in the mere execution of an instrument which is the subject of *non est factum*, as between the immediate parties, should always preclude him from asserting this plea as against an innocent assignee (*m*), and there are some weighty expressions of judicial opinion tending in this direction (*n*); but the doctrine of estoppel does not extend so far

(*e*) A plea or answer to this effect succeeded as against a *bonâ fide* assignee for value in *Thoroughgood v. Cole* (1582), 2 Coke Rep. 9A, *Foster v. Mackinnon* (1869), L. R. 4 C. P. 704, *Bagot v. Chapman*, [1907] 2 Ch. 222, and *Carlisle and Cumberland Banking Co. v. Bragg*, [1911] 1 K. B. 489, C. A. On the other hand, in *National Provincial Bank of England v. Jackson* (1886), 33 C. D. 1, C. A., and *Howatson v. Webb*, [1908] 1 Ch. 1, C. A., affirming WARRINGTON, J., [1907] 1 Ch. 537, the plea failed as against the assignee for the reasons stated in note (*d*) to § 258, *ante*.

(*f*) As in *Higsons v. Burton* (1857), 26 L. J. (EXCH.) 342, where the plea succeeded as against the assignee. It would also have succeeded in *Henderson v. Williams*, [1895], 1 Q. B. 521, C. A., but for the fact that the defendant had estopped himself as against the assignee from setting up the plea.

(*g*) See §§ 256, 257, 258, 259, in Ch. XI, Sect. 1, Sub-s. (4), *ante*, and notes thereto, where the whole topic is discussed at length, and from which those decisions wherein the denial of the contract or the passing of the property assumed the form of a defence, have been selected for the present purpose.

(*h*) It is more correct to say that there was no contract at all, than to say (as it is very commonly said) that the contract was void, which rather imports the notion of statutory or common law illegality: see the observations of BUCKLEY, L.J., at p. 481 of *Whitehorn Brothers v. Davison*, [1911] 1 K. B. 463.

(*i*) *Crouch v. Credit Foncier of England* (1873), L. R. 8 Q. B. 374, at pp. 385, 386; and *London Joint Stock Bank v. Simmons*, [1892] A. C. 201, H. L., *per* Lord HERSCHELL, at p. 215.

(*k*) See note (*n*), *inf.*

(*l*) As in *Henderson v. Williams*, *sup.*

(*m*) This contention was raised, and rejected by the C. A., in *Carlisle and Cumberland Banking Co. v. Bragg*, *sup.*

(*n*) In *Foster v. Mackinnon*, *sup.*, at p. 711, BYLES, J., delivering the judgment of the court, twice uses an expression which, if read without reference to the subject-matter of the decision, might be construed as encouraging such a contention. "It seems plain," it is there said, "on principle and on authority, that, if a blind man, or a man who cannot read, or who for some reason (*not implying negligence*) forbears to read, has a written contract falsely read over to him, the reader misreading to such an extent that . . . etc.; then, at least if there be no negligence, the signature so obtained is of no force." Later, MELLISH, L.J., at p. 87 of *Hunter v. Walters* (1871), 7 Ch. App. 75,

as is thus suggested (o) ; still less can it be stretched to the length of saying that negligence on the part of the representee is relevant to the plea itself, and may negative it (p). "Negligence has nothing to do with the question whether the deed is in fact the deed of the defendant. Negligence has only to do with the question of estoppel" (q). And it operates as an estoppel in this sense, and to this extent, only:—the representee by his conduct, whether negligent or deliberate, may in effect make an assertion to a person other than the representor that the deed is his, and, if so, and the person in question alters his position to his detriment on the faith thereof, he cannot afterwards, as against him, deny that assertion. But the third person must be individual or member of a class (as in the case of negotiable instruments) to whom the representee knows, or has reason for anticipating, that the contract will or may be assigned, and to whom, therefore, he owes a duty to be careful (r).

threw it out as "a doubtful question," but one which he expressly declined to decide, "whether, if there be a false representation concerning the contents of a deed, a person who is an educated person, and who might, by very simple means, have satisfied himself as to what the contents of the deed really were, may not, by executing it negligently, be estopped as between himself and a person who innocently acts upon the faith of the deed being valid"; and, in *Howatson v. Webb*, *sup.*, at p. 3, FARWELL, L.J., observed: "I think myself that the question suggested, but not decided by MELLISH, L.J., in that case"—*sc. Hunter v. Walters*—"will some day have to be determined, viz. whether . . . at the present time an educated person, who is not blind, is not estopped"—that is, in any and every case, apparently—"from availing himself of the plea of *non est factum* against a person who innocently acts on the faith of the deed being valid."

(o) This was the clear view of the C. A. in *Carlisle and Cumberland Banking Co. v. Bragg*, *sup.*, where VAUGHAN WILLIAMS, L.J., at pp. 493, 494, and KENNEDY, L.J. at p. 497, point out that the decision in *Foster v. Mackinnon*, *sup.*, related to a negotiable instrument, and that the generality of the language as to negligence used in the passage cited above, particularly having regard to the leading case of estoppel relied upon therein, must be taken to be limited to estoppel by conduct as against those to whom, in the course of circulation, the representee must anticipate that the instrument will, or may be, transferred; and where BUCKLEY, L.J., expresses, at pp. 495, 496, a very emphatic and well-reasoned opinion that the estoppel cannot possibly be deemed to extend of necessity to every person who in fact executes an instrument, other than a blind or illiterate person.

(p) This contention, too, would seem to have been raised in *Carlisle and Cumberland Banking Co. v. Bragg*, *sup.*

(q) *Ibid.*, at p. 495.

(r) As to the impossibility of inferring any relation of causality between the negligence and the damage in such cases as that last cited, see the observations of VAUGHAN WILLIAMS, L.J., therein at p. 494, of BUCKLEY, L.J., at p. 497, and of KENNEDY, L.J., at p. 498.

CHAPTER XIII.

STATUTORY PROVISIONS AS TO MISREPRESENTATION.

350. HITHERTO this Commentary has been concerned solely with the common law rules and principles governing actions proceedings and pleas based on misrepresentation. It now becomes necessary to consider in what respects, and in relation to what topics, the legislature has seen fit to modify, or to adopt and declare, those rules and principles. Of the modifying enactments, by far the most important are those relating to misrepresentations contained in prospectuses of companies, which will be the subject of detailed discussion in the first place (*a*). Next in importance are the statutory provisions affecting the law as to the employment of puffers at sales of land or goods by auction (*b*). Lastly, some reference must be made to a variety of enactments declaring, or giving effect to, or extending the application of, principles of law relating to misrepresentation which had already been the subject of judicial decision or recognition (*c*).

SECT. 1. THE STATUTORY LAW RELATING TO MISREPRESENTATIONS IN PROSPECTUSES OF COMPANIES.

Sub-sect. (1). Origin and Object of the Enactment.

351. In consequence of the decision of the House of Lords in *Derry v. Peck* (*d*), which was considered to reveal a defective and undesirable state of the law in relation to the liability of persons issuing prospectuses of companies, and for the purpose of remedying those defects, the Directors' Liability Act, 1890 (43 & 54 Vict. c. 64), was, in the year following, put upon the statute book. How far this measure succeeded or failed in attaining even the objects which its promoters and framers professed to have in view, and whether it was wise or just to limit its application to a particular class of representors, representees, and representations, are questions which may be more appropriately discussed in another place (*e*). For the present, the law is taken as it is found. By sect. 33 of the Companies Act, 1907 (7 Edw. 7, c. 50), a slight addition to, or amendment of,

(*a*) See Sect. 1, *inf.*

(*b*) See Sect. 2, *inf.*

(*c*) See Sect. 3, *inf.*

(*d*) (1889), 14 App. Cas. 337, H. L.

(*e*) See §§ 474-476 in App. A, Sect. 5, Sub-s. (2), *post*.

sect. 5 of the Act of 1890 was introduced. The Act itself, with the above modification, and with certain verbal alterations for the purpose of simplification of language, but without the slightest attempt to remove any of the "blots" in point of substance which "the fierce light" of eighteen years' experience had "blackened," is reproduced in sect. 84 of the Companies (Consolidation) Act, 1908 (*f*). Consequently the cases cited in this Chapter, which were all decided under the Act of 1890, or the enactment of 1907, are authorities for the interpretation of the corresponding provisions of the consolidating statute of 1908.

352. The main object and effect of the enactment is to vary, in most material respects, the common law rules as to burden of proof in actions for damages for misrepresentation (*g*); on the one hand, relieving the representee of the onus of proving fraud in the first instance, and, on the other, allowing the representor to raise, as a special affirmative defence, which it is for him to establish, that his misrepresentation was both innocent and also was based on reasonable grounds (*h*). But these serious and vital inroads on the principles of the law of misrepresentation, which, in the opinion of many, might well have been given a general application (*i*), are deliberately restricted within certain prescribed limits. Sect. 84 (1) of the Act of 1908 begins by providing that "where a prospectus invites persons to subscribe for shares in or debentures of a company, every person who is a director of the company at the time of the issue of the prospectus, and every person who has authorized the naming of him and is named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time, and every promoter of the company, and every person who has authorized the issue of the prospectus, shall be liable to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement therein, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein, or issued therewith, unless it is proved . . ." etc. Thus the statutory *privilegium* is only conferred in respect of a particular class of representation, upon a specified class of representee, and against a specified class of representor. These limits and restrictions have now to be considered.

Sub-sect. (2). To what Representations the Enactment relates.

353. The only representations to which the section applies are "statements" (which must obviously be in writing) contained in (1) any

(*f*) The amazing omissions and ambiguities which characterized the Act of 1890, and which the legislature has, with fatal fidelity, reproduced in 1908, will be pointed out *seriatim* in the course of the present Section.

(*g*) For these rules see Ch. X, Sect. 1, *ante*.

(*h*) The latter element is not necessary to constitute innocence, according to the decision of the House of Lords in *Derry v. Peek* (1889), 14 App. Cas. 337, H. L. See Ch. V, Sect. 2, *ante*.

(*i*) See App. A, Sect. 5, Sub-s. (2), §§ 474-476, *post*.

prospectus, or (2) any report or memorandum appearing on the face thereof, or by reference incorporated therein, or issued therewith (as an "inset" or otherwise). "Prospectus" is defined in sect. 285 of the Act of 1908 as meaning "any prospectus, notice, circular, advertisement, or other invitation" (that is, documentary invitation, for otherwise a memorandum or report could not "appear on the face thereof," or "be incorporated," or "issued" therewith) "offering to the public for subscription or purchase any shares or debentures of a company." This definition involves the necessity of inquiring further as to the meaning of the expressions "company," "shares," "debentures," and "offer to the public."

354. The terms "company," "shares," and "debenture" are also the subject of the abovementioned interpretation clause (sect. 285). "Company" is there defined to mean "a company formed and registered under this Act, or an existing company," and "existing company" means a company formed and registered under the Joint Stock Companies Act, 1856; the Joint Stock Companies Acts, 1856, 1857; the Joint Stock Banking Companies Act, 1857, and the statute 21 & 22 Vict. c. 91, but not the statute 8 Vict. c. 110. The amazing result of this limited definition is that any prospectus of a chartered or parliamentary company is entirely exempt from the statutory liability, though, as is pointed out by Lord Lindley in his treatise on companies, when observing upon the section in question, the company whose prospectus formed the subject of the very decision which gave rise to the passing of the Act of 1890 (*k*), was a tramway company incorporated by Act of Parliament. So that if there were now to be a revival of *Derry v. Peek* with the original cast, the very directors who escaped liability in 1889, to the horror and disgust of those who were responsible for the Act of 1890, would again escape liability now. It is just possible to excuse or explain the blunder of 1890, as a *casus omissus per incuriam*; but what is to be said for this deliberate perpetuation of it after the lapse of eighteen years?

355. "Share" is defined by sect. 285 of the Act of 1908 to mean "share in the share capital of the company," and to "include stock except where a distinction between stock and shares is expressed or implied," and there is no distinction expressed or implied in sect. 84. "Debenture" is expressed to include "debenture stock," but the term itself has no statutory definition either in the Act of 1908 or in any other statute. Judicially it has been declared by CHITTY, J., to mean "a document which either creates a debt or acknowledges it," and, he adds, "any document which fulfils either of these conditions is a debenture" (*l*).

(*k*) *Derry v. Peek*, *sup.*

(*l*) At p. 264 of *Levy v. Abercorris Slate and Slab Co.* (1887), 37 C. D. 260. For the etymological and legal origin and history of the word, see the note to p. 264 of the case last cited: and Stroud's *Judicial Dictionary*, and the Oxford Dictionary, *sub voc.* The meaning of both "debenture" and "debenture stock" is discussed at pp. 20-28 of the author's *Director's Liability Act*, 1890. Instruments known as "debentures" seem to have been freely used by Cromwell and the Parliament, during the Civil War, for the purpose of satisfying the soldiers, when cash was lacking, and these were redeemed afterwards by allotments of forfeited estates of royalists. In a note prefixed to

356. The prospectus must be a document which offers shares or debentures (*m*), as the case may be, to the public for subscription, that is, for application with a view to allotment (*n*). An "offer to the public" within the meaning of sect. 285, and an "invitation to persons" within that of sect. 84, means an offer, whether by advertisement or by distribution in circular form through the post, to the public at large, or some class or section of the community, or to a number of selected individuals, amongst whom existing shareholders in the company may or may not be included; but if the invitation is limited to such existing members, the notice, circular, or document containing it is not a prospectus (*o*). Nor is a document which is addressed by an individual to certain specific persons, in furtherance of a private speculation or transaction, and marked "strictly private and confidential" (*p*). And a document which, though relating to a contemplated issue of capital, and sent to personal friends of the directors with a request to place it before their friends and clients, contains no invitation to any of those addressees to subscribe themselves for shares, is not a prospectus, because, even if such persons can be regarded as "the public," there is no "offer" to them of share capital (*q*). If, as often happens, there are several prospectuses, or several forms of one prospectus, issued either successively, first as "abridged" and then as complete (*r*), or first as "advance," and then as final (*s*), or simultaneously in different countries or places or newspapers (*t*), each one of these is a prospectus, though only

Letter LVI of *Oliver Cromwell's Letters and Speeches*, vol. i, p. 279, Carlyle explains that at that time "soldiers could seldom get their pay in money; with their 'debentures' they had to purchase forfeited lands; a somewhat uncertain investment of an uncertain currency."

(*m*) *Drincqbier v. Wood*, [1899] 1 Ch. 393 was an instance of a prospectus offering debentures.

(*n*) "For subscription or purchase" is the expression used in sect. 285, but it is clear that, at least in its application to sect. 84, "purchase" in the market is intended to be excluded, and that "purchase" must be taken to be a mere synonym of subscription, and "or" to be used in a conjunctive, not a disjunctive sense.

(*o*) *Burrows v. Matabele Gold Reef and Estates Co.*, [1901] 2 Ch. 23, per FARWELL, J., at p. 27. This was a case of an "offer of shares to the public for subscription" within sect. 8 (1) of the Companies Act, 1900, now sect. 89 (1) of the Act of 1908.

(*p*) *Sherwell v. Incandescent Mantles Syndicate* (1907), 23 T. L. R. 482, per WARINGTON, J. This was a decision on "shares offered to the public for subscription" within sect. 4 (1) of the Act of 1900, which is reproduced in sect. 85 (1) of the Act of 1908.

(*q*) *Sleigh v. Glasgow and Transvaal Options, Ltd.* (1904), 6 F. 420, a case of rectification of the register, which raised the point whether the thing called by the applicant a prospectus was, in fact or law, a prospectus at all.

(*r*) *White v. Haymen* (1883), C. & E. 101, a case under sect. 38 of the Companies Act, 1867, where the plaintiff complained of the omission of a material contract from an "abridged prospectus" advertised in a newspaper, and the defendant vainly urged that "constructive notice" was given to the plaintiff by the full prospectus afterwards issued, MATHEW, J., holding that the plaintiff having proved that he took his shares on the faith of the first prospectus, and had no actual notice of the later one, there was no room for the application of the doctrine in question.

(*s*) *Hoole v. Speak*, [1904] 2 Ch. 732.

(*t*) In *Drincqbier v. Wood*, *sup.*, the plaintiff took his debentures on the faith of two documents, a prospectus so entitled, and a letter, under one cover. Each of them contained untrue statements. BYRNE, J., at p. 403, held that each rendered the defendants liable, one as a prospectus, within the meaning of the then more restricted definition contained in sect. 3 of the Act of 1890, and the other as a "notice" within

that one of them upon the faith of which the representee subscribed for shares or debentures is "*the prospectus*" which entitles him to relief (*u*). If *that* prospectus contains no untrue statement, or was not issued by the person sought to be made liable, the representee fails, however obnoxious to the statute the other or others of them may be (*x*); on the other hand, if *that* prospectus does contain any misrepresentation, it is no answer to point to another or others which omit it (*y*).

357. The Act of 1890 applied to statements contained in any "prospectus or notice," the latter term being intended to embrace all documents, not being such as are technically and strictly within the commercial description of a "prospectus," or not so headed or labelled, but which nevertheless are issued with the object of inviting persons to subscribe for shares or debentures. The Act of 1908 achieves the same end, and avoids the necessity for successive repetitions of three words instead of one, by defining "prospectus" in sect. 285, as above cited (*z*), so as to include all such documents. But since both statutes relate also to statements contained "in any report or memorandum appearing on the face thereof, or by reference incorporated therein, or issued therewith," it is strange that in sect. 285 of the later Act the definition of "prospectus" was not made to include such reports or memoranda, since this would carry out the intention which the legislature must have had in 1890, but to which, by the omission of any further allusion to these accompanying reports and memoranda in several places where such allusion would be expected, they appear to have failed to give full effect; this, however, has not been done, and accordingly the same defect characterizes the enactment of 1908 (*a*).

Sub-sect. (3). The Persons to and against whom respectively the Statutory Right is given.

358. The next question to be considered is that of the persons affected by the enactment. To what description of representee is the statutory cause of action given, and against what classes of representors? First, as to the representee: the only person who can take advantage of the *privilegium*

the same section. Each of them would now be deemed a prospectus within the more extended definition of that term contained in sect. 285 of the Act of 1908. In *Roussell v. Burnham*, [1909] 1 Ch. 127, there was a prospectus issued in England, which stated the minimum subscription on which the company might proceed to allotment, as required by sect. 85 of the Act of 1908, and another advertised in a French newspaper which did not. The plaintiff sued for relief under sect. 86 in respect of the French prospectus, on the faith of which he established that he had subscribed for his shares, and PARKER, J., held that he was accordingly entitled to the relief prayed.

(*u*) *Roussell v. Burnham*, *sup.*, per PARKER, J., at pp. 130–132.

(*x*) In *Hoole v. Speak*, *sup.*, the defendants were not shown to have authorized the issue of the advance prospectus, which contained the same misrepresentations as the further or final prospectus which was the subject of *Shepherd v. Browne*, [1904] A. C. 342, H. L. The latter was shown to have had the authority of the defendants for its issue. Consequently, in the first case the claim failed; in the second, it succeeded.

(*y*) *White v. Haymen*, cited in note (*r*), *sup.*

(*z*) See § 353, *ante*.

(*a*) Three instances of this omission, each of them of considerable importance, are referred to in § 359, § 361, and § 368 respectively.

is a member of the "public," or of the "persons," to whom shares or debentures are "offered for subscription," in the language of sect. 285, or who is "invited to subscribe" therefor, in the equivalent phraseology of sect. 84 (1), by a prospectus of a company, and who in fact takes shares or debentures on the faith of "the prospectus" (b). A company or corporation may be such a person (c).

359. Next, as to the persons liable to the statutory proceedings. These are described in sect. 84 (1), which has already been cited so far as material to the present question (d), as belonging to four classes. It will be convenient to examine first the class which in the section is mentioned last, because it is in respect of this class that there is least departure from the common law, and to deal afterwards with the three other classes in which the variation is more marked. Any person (e) who "authorized the issue of the prospectus" is *primâ facie* liable to pay compensation as a statutory representor, just as he would be liable as a representor in an action for damages at common law (f), "unless it is proved . . . that after the issue of the prospectus and before allotment thereunder, he, on becoming aware of any untrue statement therein, withdrew his consent thereto, and gave reasonable public notice of the withdrawal, and of the reason therefor" (g). The language of the above provision suggests doubts and difficulties, which, though not yet the subject of judicial inquiry, may become so hereafter. For instance, does a subscriber for shares entitle himself to the aid of the statute on proof that the person sought to be made liable adopted and ratified the prospectus, without having authorized it in the first instance? There could not be a shadow of a doubt but that this question, according to the ordinary common law rule of *omnis rati habitio retrotrahitur*, etc., would have to be answered in the affirmative (h), were it not for the fact that, in sub-sect. (2) of sect. 84, the legislature, *in pari*

(b) As to what is involved in the expression "on the faith of the prospectus," see § 375 in Sub-s. (4), *post*. As to the meaning of "the prospectus," see § 356, *sup*.

(c) See sect. 19 of the Interpretation Act, 1889. The representee who sued under the Act of 1890 in *J. & R. Coats, Ltd. v. Crossland* (1904), 20 T. L. R. 800, was a limited company.

(d) See § 352, *ante*.

(e) "Person" includes "company"—see sect. 19 of the Interpretation Act, 1889—but not the company itself whose prospectus is issued, because sect. 84 of the Act of 1908 exhibits abundant evidence of "a contrary intention," within the meaning of the section of the Act of 1889. See also the rule stated in Ch. X, Sect. 5, Sub-s. (3), *ante*.

(f) See Ch. VIII, Sect. 1, *ante*.

(g) This is No. (iii) of the defences available to a defendant which are enumerated at the end of sect. 84 (1) of the Act of 1908.

(h) See again, Ch. VIII, Sect. 1, *ante*. One way of getting over any difficulty created by a rigid adherence to the literal meaning of "authority," as excluding ratification, is a resort to the theory that acts indicating subsequent adoption are not merely equivalent to previous authority (*mandato priori equiparatur*), but are evidence thereof. Thus, in *Glazier v. Rolls* (1889), 42 C. D. 436, C. A., KEKEWICH, J. (whose ruling on this point is unaffected by the reversal of the decision itself by the C. A.), held that the defendant, "by taking advantage of the prospectus, taking the money or shares which were got by means of that prospectus," and never repudiating it after notice of the matters which formed the subject of complaint, furnished "*strong evidence to shew that originally the statement was made with his authority*" (p. 444).

materiâ, has deliberately supplemented the words—"unless he has authorized the issue of the prospectus"—with the addendum—"or has adopted or ratified it," which looks as if, for the purposes of the statute, the term "authority" was not intended to include, as it clearly would at common law, a subsequent ratification, since, where this addition is intended, it is expressed. One thing, however, is clear, that the onus is on the plaintiff to allege and prove the defendant's authorization of the issue, whatever this may include or exclude (*i*); and that the onus is on the defendant to allege, and establish by evidence, the statutory affirmative plea that though in the first instance he authorized (or, perhaps, ratified) the issue, yet that after such issue, and before allotment thereunder, each and every of the several prescribed conditions were fulfilled, viz. that he (i) acquired knowledge of *some* untrue statement in the prospectus—not necessarily the particular statement on which he relies, (ii) in consequence of, and immediately upon, acquiring such knowledge, withdrew his consent, (iii) gave notice of such withdrawal, which must be (iv) reasonable, and (v) public, and (vi) gave notice also of his reason for withdrawal, that is to say (presumably), notice of the untrue statement the discovery of which prompted the withdrawal. Failure to discharge any one of these conditions destroys the efficacy of the statutory plea; so that unless, to prevent absurd results, the language of the enactment is to be deliberately ignored, it would follow that a defendant who never had any knowledge or even belief that any statement in the prospectus was untrue, but wished to sever his connection with associates of a suspicious or disreputable character, or devoid of business capacity, or with an enterprise which might on reflection appear to him to be doomed to failure, could not avail himself of the plea. Again, if he gave reasonable public notice of his withdrawal, but omitted to state the reason (whether from carelessness, or because of a natural reluctance to expose himself to an action of libel), he would lose the benefit of the statutory defence, though by the mere act of withdrawal before allotment he would be revoking his representation before it was acted upon, which, at common law, and in common sense, would be sufficient to excuse him (*k*). Lastly, the "untrue statement" might have been in a report or memorandum accompanying the prospectus, and not in the prospectus itself, in which case (since the provision in question omits all mention of such reports or memoranda), there never could have been any "untrue statement" on becoming aware of which he could withdraw, or of which he could give notice, so as to qualify himself for the protection which the Act confers in that event only.

360. Apart from the class of those who actually issued or authorized the issue of the prospectus, there are three classes of persons against whom

(*i*) Thus, in *Hoole v. Speak*, [1904] 2 Ch. 732, the plaintiff failed to discharge this onus, and his action accordingly failed also; and in *Sleigh v. Glasgow and Transvaal Options, Ltd.*, (1904) 6 F. 420, an authority to issue to the public was not proved, and, on this amongst other grounds, the applicant failed.

(*k*) See Ch. IV, Sect. 3, *ante*.

the statutory proceedings may be maintained without the necessity of alleging or proving that they in fact authorized such issues. These comprise, respectively, (i) "every person who is"—"was," of course, is intended—"a director of the company at the time of the issue of the prospectus"; (ii) "every person who has authorized"—"who authorized" it should be—"the naming of him and is"—it should be "was"—"named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time," and (iii) "every promoter of the company" (*l*). In other words, in respect of these three descriptions of person, there is a statutory presumption of liability, as much as if they could be proved to have issued the prospectus—a presumption which is rebuttable by counter-evidence of the nature indicated in the section, so far as regards the first two classes (*m*), but irrebuttable as regards the third (*n*). If the plaintiff in the statutory action alleges that the defendant occupied at the material dates any one of these three positions, he has a *primâ facie* right to proceed, without concerning himself with any other question; but if he fails to prove such allegation, or if (in the case of the first two cases) the *primâ facie* right is defeated by averment and proof of the requisite matters in that behalf, he must establish a case of actual authorization of the issue, which is still open to him, or he fails altogether in his attempt to bring himself within the statutory privilege, which failure of course in no way debars him from resort to all common law remedies and relief to which he can make out a title (*o*).

361. The provisions of the section, so far as they relate to the class of persons who were directors in fact at the date of the issue of the prospectus, whether so named in such prospectus or not, are of distinct utility. They come into operation and are of advantage in the not uncommon case of a prospectus issued by co-directors or co-agents or sub-agents of a director, where at common law such director might escape in the absence of proof of express authority (*p*); and in the somewhat improbable case of a man who, for some reason, is not named in the prospectus as an existing or prospective director, and who therefore would not be required by sect. 80 (2) of the Act of 1908 to sign the filed prospectus (since that enactment only applies to persons so named), but who yet can be shown to have in fact occupied the position of a director at the material date. The privilege is expressly withheld in any case "where a company existing on the 18th day of August, 1908, has"—which must mean "had before that date"—"issued shares or debentures, and for the purpose of obtaining further capital by subscriptions for shares or debentures issues a prospectus," in which case "a director shall not be liable in respect of any statement

(*l*) See sect. 84 (1) of the Act of 1908.

(*m*) See §§ 363, 364, *inf*.

(*n*) See § 365, *inf*.

(*o*) In nearly all the actions which form the subject of the decisions under the statute of 1890, or the enactment of 1908 which reproduces it, the claim is for statutory relief, and (alternatively) for damages at common law.

(*p*) See § 158 in Ch. VIII, Sect. 1, Sub-s. (3), *ante*.

therein unless he has authorized the issue of the prospectus, or has adopted or ratified it" (*q*)—in other words, unless the facts are such that he would be deemed a representor at common law. It will be observed that, according to the strict wording of the proviso in question, a director of such a company would still be liable in respect of any statement contained in a report or memorandum appearing on the face of, or incorporated with, or accompanying, the prospectus, and that, so far as appears, any person suing in respect of an untrue statement contained in a document of the last-mentioned nature would not be under any obligation to prove that the director authorized the issue of the prospectus, though, if it had been contained in the prospectus itself, he would—a strange result (*r*). Another defect in the language of the proviso is that it applies only to "a director," and not to a person named with authority as such in the prospectus, though one may suppose that such a person would be entitled to at least as much consideration, in the case of existing companies inviting subscriptions for further capital, as a director in fact; and that if the one class has an equity to put the plaintiff to proof that the prospectus was issued with his authority, the other has an equal, or a greater, equity. Nor is there any apparent reason why even the promoter class should be excluded from the preferential position accorded to directors. This is on the assumption that any difference whatever should be made between the case of a prospectus seeking to obtain further capital, and one which is issued at the birth of the company. But it may well be doubted whether there is any justice or practical advantage in such a distinction. An untrue and misleading statement is as untrue and misleading when contained in the prospectus of a company which wants more money, as in that of a company which wants money to start business with.

362. The second class of persons against whom there is a *prima facie* or defeasible right to proceed under the enactment comprises those who, whether directors in fact or not at the date of the issue of the prospectus were, *with their authority*, named therein as such or as having agreed to become so either immediately or after an interval of time. It is clear that the burden is on the plaintiff of proving not only the naming, but the authority, in the first instance. It has already been seen that a false statement in a prospectus that such and such a person is, or has agreed to be or become, a director, gives a cause of action at common law to any one deceived thereby into subscribing for shares, as against those responsible for the prospectus (*s*), but not against the persons so misdescribed; whereas, under the statute, he is in the favourable position of being able to sue thereunder both the named and the actual directors, and also the persons issuing the prospectus; and, if he should fail against the named directors, or

(*q*) See sect. 84, sub-s. (2), of the Act of 1908, which reproduces sect. 3. (3) of the Act of 1890, with the necessary verbal alterations, except that the legislature forgot to alter "has" which was the correct tense to use in 1890, to "had"⁵⁵ which was alone appropriate to 1908.

(*r*) See § 356, *ante*.

(*s*) See § 137 in Ch. VI, Sect. 3, Sub-s. (3), *ante*.

if they should succeed in defeating his *primâ facie* right by proof of the matters of statutory excuse to be mentioned presently (*t*), such failure or proof would be evidence of a further untrue statement on the part of the directors in fact, or those in fact issuing the prospectus, which would entitle him to succeed against them in respect of such misrepresentation, even if he failed to prove any other untrue statement relied upon.

363. To each of the last-mentioned classes two special affirmative pleas or excuses are available. The enactment provides that the *primâ facie* right to proceed against a director in fact, or a "named" director, is rebuttable by proof, the burden of establishing which is on him (as is shown by the words "unless it is proved")—" (i) that, having consented to become a director of the company, he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or (ii) that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave reasonable public notice that it was issued without his knowledge or consent " (*u*). The language in which this part of the enactment is expressed *donne furieuse-ment à penser*. Why are the two pleas separated? Is it that one of them is intended to apply to one of the two classes mentioned, and the other to the other, on the principle of *reddendo singula singulis*? And if so, which plea is to be the exclusive property of which class? Or are both available to either class? And, if so, why in the one case is it incumbent on the defendant to prove that the prospectus was issued "without his *authority* or consent," and, on the other, "without his knowledge or consent"? And, if any distinction is intended to be drawn between these two forms of expression, what is that distinction? And if the first plea is meant to apply to the second class, why is "consent to become a director" made the subject of the plea, and not the "authorization of the naming of him as director," which is mentioned in describing the class? And, again, is "authority" meant to include, or, as in sub-sect. (2) of the section, to exclude, adoption and ratification (*x*)? Lastly, why is "reasonable public notice" required of the issue of the prospectus without the defendant's knowledge or consent in the latter case, whilst no notice whatever need be given of the issue "without his authority or consent," or of the withdrawal of his original consent to the directorship, in the former? These ἀπορίαι are presented in a stately procession for the reader's consideration, without any attempt to resolve them. It is sufficient, perhaps, to append the convenient Aristotelian formula, ταῦτ' ἴσως ἐτέρας ἂν εἴη σκέψεως. That σκέψις must be judicial (*y*). One or two points have,

(*t*) See § 363, *inf.*

(*u*) These are the first two of the three statutory pleas in rebuttal, numbered (i), (ii), and (iii), at the end of sect. 84, sub-s. (4) of the Act of 1908.

(*x*) See § 359, *ante*.

(*y*) The author made some attempt to wrestle with these questions in his commentary on the Directors' Liability Act, 1890, when it was a virgin statute. On looking at these comments again, after twenty-one years, he is convinced that any such attempt must be the merest guesswork, and that, the more closely the amazing

indeed, been decided on the language in question, but they are of a kind which needed no decision, such as that an issue of the prospectus with the knowledge of the defendant is established by proof that he knew that a prospectus was to be issued, though he was ignorant of its contents, because he sedulously abstained from inquiry (z), and that the date at which "the reasonable public notice" is to be given is the date at which, *in the above sense*, he became aware of the issue, and not the later date at which he was forced to acquire that knowledge of its contents which till then he had carefully and diligently shunned (a); none, however, of the difficulties above suggested have yet received judicial investigation.

364. The term "director," which was not defined in the Act of 1890, is the subject of, not, indeed, a definition, but a description which involves a definition, in sect. 285 of the Act of 1908. It is there stated that "'director' includes any person occupying the position of director by whatever name called,"—which shows that the differentia of the expression is the mere tenure of a post by virtue of which the person is empowered, if he chooses, to exercise any acts of direction, management, control, or administration in relation to the business or affairs of the company. The particular title conferred upon him by the articles is wholly immaterial; he may be dignified by the style of "governor," or manager, or member of a Council of Administration, or of an Executive and Finance Committee (b); but, if he is in a position to exercise directorial authority, he is none the less a "director." It is a case of "a rose by any other name." Regard is to be had to the nature of the office, and not to the words of the label. One would have supposed that the courts needed no assistance or encouragement from the legislature to enable them to apply to this case, just as to any other, a very elementary principle of interpretation (c); but it has

draftmanship of the enactment is examined, the more hopeless it becomes to divine the intention of the legislature as regards the points referred to in the text.

(z) *Drincqbier v. Wood*, [1899] 1 Ch. 393, *per* BYRNE, J., at p. 405.

(a) *Ibid.*, *per* BYRNE, J., at p. 406.

(b) The last two were titles conferred on those named in the prospectus as having the conduct of the company's affairs in *Re Metropolitan Coal Consumers Association, Wainwright's Case* (1890), 63 L. T. 429, C. A. Sometimes a secretary (so called) exercises the principal, or only, directorial acts required, and substantially conducts its business.

(c) This view was expressed by the author in 1890, at p. 95 of his work on the Directors' Liability Act: "it is suggested by a perusal of *Wainwright's Case* . . . that future companies may create, and their prospectuses name, under such titles as the above, the persons designed to conduct the business of the company, in the idea that, by the avoidance of any use of the name 'director,' the persons who are in fact to act as such may escape *prima facie* liability under this section. Such an experiment would, of course, be wholly futile; the courts will . . . look at the substance of the matter, without regard to the name, and will examine whether the acts to be done by such persons are or are not directorial acts, and decide accordingly." In accordance with the principles stated in the text, to take a few prominent instances, a "condition" so called by the parties has frequently been considered as a warranty, and a "warranty," so called, as a condition: that which the contracting parties have solemnly declared and agreed to be "liquidated damages" has been held to be a penalty, and that which they have described as a "penalty" to be liquidated damages: associations termed "trade unions" have been deemed to be mere "friendly societies," and "friendly societies," so styled, have been held to be trade unions. And there are innumerable other examples.

apparently been thought better to be on the safe side (*d*), though, as a matter of fact, all such statutory interpretations, unless absolutely necessary, are a source of danger, in so far as they suggest doubts (on the *expressio unius* principle) whether, in the case of other definitions not expressed in the same precautionary terms, the courts are left by the legislature free to apply the common rules of interpretation. It will be observed, further, that the statutory language is "occupying the position of a director"; that is to say, the person in question may be one who reigns, but does not govern; it is only necessary that he should fill the office, not that he should exercise any of the acts belonging to it; he may in fact be a *roi fainéant*, or an Epicurean deity, surveying in "divine tranquillity" the conduct of affairs in which he takes no part or lot; he is still a "director" for the purposes of the statutory liability to persons taking shares on the faith of the prospectus; though, according to a recent decision, complete passivity, ignorance, and incompetence does not of itself render him in any respect or to any extent liable to the company, or to the general body of shareholders, for negligence or otherwise (*e*).

365. The third class of persons against whom there is a statutory presumption of liability, in this case irrebuttable (*f*), without proof of any actual authorization of the issue of the prospectus, comprises "every promoter of the company" (*g*), which is expressed to mean every promoter of the company "who was a party to the preparation of the prospectus, or of the portion thereof containing the untrue statement." So that every promoter of the company, though he was neither a director in fact, nor named with authority as such in the prospectus, and though he may have taken no part in the *issue* of the prospectus, is made amenable to the statutory proceedings if, but only if, he had a hand in the *preparation* of the prospectus, or of so much of it as contained the untrue statement relied upon by the plaintiff as the ground of his complaint. The burden is on the representee of proving each of the above matters; it is not enough to show that the person sought to be brought within the class in question was a promoter, if he did not also take part in the preparation of the prospectus; nor to establish that he was the author, or part-author, of the prospectus, if he was not also *at that time* a promoter of the company. It is desirable to consider separately these two elements in the plaintiff's burden of proof.

366. First, as to promotership. The term "promoter" finds no place

(*d*) A precaution which Oliver Cromwell found it very necessary to take, when by the proclamation which he issued after the execution of Charles I, he prohibited, under grievous pains and penalties, the setting up of "any of the posterity of the late King," as "King, or Chief Magistrate."

(*e*) *Re Brazilian Rubber Plantations and Estates, Ltd.*, [1911] 1 Ch. 425, *per* NEVILLE, J., at p. 437: "he" (a director) "is, I think, not bound to bring any special qualifications to his office. He may undertake the management of a rubber company in complete ignorance of everything connected with rubber, without incurring responsibility for the mistakes which may result from such ignorance. . . . *He is not, I think, bound to take any definite part in the conduct of the company's business.* . . ."

(*f*) Sect. 84 (1) of the Act of 1908.

(*g*) See sect. 84, sub-s. (5), reproducing sect. 3 (2) of the Act of 1890.

in company legislation until 1867, when it appears in sect. 38 (now repealed) of the Companies Act of that year. Neither in that statute, nor in any other—not even in the Act of 1908 (*h*)—has the legislature attempted any definition of the term. The courts have been equally reluctant, and, with equal wisdom, to make the attempt. Though most willing to indicate in general terms the kind of ideas which the expression may include, judges have abstained from giving any exhaustive enumeration of the acts and proceedings which it excludes, knowing full well that the astute and versatile gentlemen professionally engaged in the genesis of the baser sort of enterprise will make haste to limit their action to just these excluded operations, and to keep on the windy side of any cast-iron connotation devised by Courts or Parliament. *Quo teneam nodo mutantem Protea vultus?* The *nodus* which is to perform this feat must be as elusive, and as capable of successive transformations, as its intended prisoner. The leaden rule of the Lesbians, which bends itself to the exigencies of the moment, and can be applied to the case of the particular alleged promoter, without prejudice to its future application in a different shape to totally different cases of other alleged promoters, is the only apt instrument for this kind of work. It will be found that all the judicial elucidations of promotership are conceived in language no less general and in most cases even wider, than the term itself, and that each of them irresistibly suggests the bishop's famous description of an archdeacon as "a person who goes about discharging archidiaconal functions." Thus COCKBURN, C.J., characterized a promoter as "one who undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish that purpose" (*i*). Lord BLACKBURN considered the expression "a short and convenient way of designating those who set in motion the machinery by which the Act enables them to create an incorporated company" (*k*). In the view of Lord BOWEN (then BOWEN, J.), "the term 'promoter' is a term not of law, but of business, usefully summing up in a single word a number of business operations familiar to the commercial world by which a company is generally brought into existence" (*l*). Lord LINDLEY (then LINDLEY, J.), after observing that the word "has no very definite meaning," goes on to speak of it as involving "the idea of exertion for the purpose of getting up and starting a company (or what is called floating it), and also the idea of some duty towards the company imposed by or arising out of the position which the so-called promoter assumes towards it" (*l*)—a description which,

(*h*) For, obviously, the statutory interpretation, referred to in the text, which merely says that "promoter" shall, for certain purposes, be deemed to mean only one species of the class, leaves the class itself undefined.

(*i*) *Twycross v. Grant*, No. 1 (1877), 2 C. P. D. 469, C. A., at p. 541.

(*k*) At p. 1268 of *Erlanger v. New Sombbrero Phosphate Co.* (1878), 3 App. Cas. 1218, H. L.

(*l*) At p. 407 of *Emma Silver Mining Co. v. Lewis* (1879), 4 C. P. D. 396. As LINDLEY, L.J., in the C. A., the afterwards similarly calls the expression "an ambiguous term," *Lydney and Wigpool Iron Ore Co. v. Bird* (1886), 33 C. D. 85, C. A., at p. 93.

in the earlier part, is a good instance of *obscurum per obscurius*, or at least of *generale per generalius* (for "float" is an even vaguer and more ambiguous expression than "promote"), and, in the latter part is a case of *ὑστερον πρότερον*, or "the cart before the horse," for the thing is there attempted to be identified by reference to the legal consequences which flow from it when ascertained to exist, as if one were to describe a trustee as one who can derive no profit from his trust, or an agent as one who must account to his principal. Four years later, after reviewing the above observations, BACON, V.-C., expressed his opinion that "not much assistance is to be derived" from them, and that they are "not satisfactory" (*m*), which, if regarded as intended definitions, they are not; they were, however, evidently not so intended, but only as general descriptions, in which character they are, for the reasons already given, by no means unsatisfactory. At a later date, COTTON, L.J., in one of his judgments, boldly avowed his "dislike" of the term, and after this pronouncement, carefully avoided using it at all (*n*).

367. Whether a man was or was not a promoter at all, and if he ever was, whether he had begun to assume this character, or having assumed it, had ceased to act in that capacity, at the material date (which, for the purposes now under discussion, is the date of the issue of the prospectus),—are all questions of fact (*o*), the burden of establishing which is on the person seeking to avail himself of the statutory remedy. And, therefore, "it is necessary to see in each case what the so-called promoter really did, before his legal liabilities can be accurately ascertained." It is only in the very rare cases in which all the facts are undisputed that the question of promotership or no promotership can be treated as one of law (*q*). In every case in which it has been necessary to prove a defendant's promotership, whether for the purposes of establishing a claim under sect. 38 of the Act of 1867, or the fiduciary responsibility of the promoter, as such, to the company which he promoted, or his liability to a liquidator on a misfeasance summons, or his liability under the enactment now under consideration, and the plaintiff has proved such acts and conduct on the part of the defendant as, in the individual circumstances of the case, appeared to the tribunal to indicate the existence of promotership at the material date, the plaintiff has succeeded (*r*). Whenever, in any such case, he has failed

(*m*) *Re Great Wheal Polgooth Co.* (1883), 53 L. J. (CH.) 42, at p. 46.

(*n*) *Ladywell Mining Co. v. Brookes* (1887), 35 C. D. 400, C. A., at p. 411.

(*o*) See *Twyecross v. Grant*, No. 1, *sup.*, per COCKBURN, C.J., at p. 541: "the question as to whether one who in the outset was a promoter of a company continues or ceases to be so, becomes . . . a question of fact."

(*q*) *Lydney and Wigpool Iron Ore Co. v. Bird*, *sup.*, per LINDLEY, L.J., at p. 93. See generally the cases cited in the next note.

(*r*) The following are cases in which promotership was proved, and which also serve as illustrations of the kind of operations which have been considered by judges and juries as sufficient to establish that fact: *Twyecross v. Grant*, No. 1, *sup.*, per COCKBURN, C.J., at p. 541: "that the defendants were the promoters of the company from the beginning can admit of no doubt. They framed the scheme; they not only provisionally formed the company, but were, in fact, to the end its creators; they found the directors and qualified them; they prepared the prospectus; they

to discharge this burden, that is, whenever he has failed to establish the fact of promotership at any time, or the fact that the defendant was a promoter at the material date, though the defendant may have been a promoter previously, or may have become so afterwards (s), the plaintiff's claim has failed altogether. It must not be forgotten, however, in considering the question of the date and duration of the promotership, when this is a material question, that, just as a man may be a promoter before the company is formed and registered, so also he does not necessarily cease to be such after the incorporation of the company (t).

368. It remains to consider the second of the above-mentioned *alleganda et probanda*. It is of no avail to prove any number of acts and operations conclusively indicative of promotership in the general sense, unless the plaintiff is also in a position to establish that the defendant was engaged

paid for printing and advertising, and the expenses incidental to bringing the undertaking before the world"); *Nant-y-Glo and Blaina Ironworks Co. v. Grave* (1878), 12 C. D. 738 (per BACON, V.-C., at p. 744); *Emma Silver Mining Co. v. Grant* (1879), 11 C. D. 918, C. A. (per JESSEL, M.R., at p. 936: "he himself—whether he actually drafted or whether he settled and approved the memorandum and the articles of association is quite immaterial—was the person who was the author of those instruments, adopted the contract on behalf of the company, and acted from beginning to end for the company, formed it, provided it with directors, made a contract for it, and adopted that contract for it. . . . It is not necessary that he should have done all these things to make him a promoter; even some of them would be sufficient"); *Glasier v. Rolls* (1889), 42 C. D. 436, C. A. (per KEKEWICH, J., at p. 443: "he is a party to the agreement, he insists upon seeing the prospectus, he was to take a large share of the purchase money, which could only be reached by the successful floating of the company, and I have no doubt whatever that he is properly described as one of the promoters"); and *Re Olympia, Ltd.*, [1898] 2 Ch. 153, C. A. (per COLLINS, L.J., at p. 181, who says of the persons there found to be promoters of the company that "they did every act necessary to give it existence, framed the memorandum and articles, prepared the prospectus, and generally dictated the conditions of the company's existence"), and, on further appeal, *sub nom. Gluckstein v. Barnes*, [1900] A. C. 240, H. L. (per Lord ROBERTSON at p. 256: "speculators have found . . . the directors of a company, to be immediately floated for the purpose of buying a property which these same individuals associated to acquire," and "have taken a decisive step in shaping and limiting the company. It may well be asked, if this be not an act of promotion, what is?").

(s) As in *Re Coal Economizing Gas Co., Gover's Case* (1875), 1 C. D. 182, 187, C. A. (where the alleged promoter was found not to be so at the material time, though he was afterwards); *Re Great Wheal Polgooth Co.* (1883), 53 L. J. (CH.) 42, 47–50 (where no promotership at any time was established); *Ladywell Mining Co. v. Brookes* (1887), 35 C. D. 400, C. A. (per COTTON, L.J., at pp. 411–413); and *Re Lady Forrest (Murchison) Gold Mine, Ltd.*, [1901] 1 Ch. 582, 589 (where WRIGHT found that there was no promotership when the property was acquired, which was in that case the material date).

(t) *Twyecross v. Grant, No. 1, sup.*, per COCKBURN, C.J., who, at p. 541, after the passage cited in note (r), *sup.*, goes on to point out that "in all these respects the directors were passive," and that as long as they remained in this state of passivity, and the defendant in a state of corresponding activity, a jury would be justified in finding that they had not lost their character of promoters, nor would they do so until the directors should take the whole direction and management of the concern entirely into their own hands. So in *Emma Silver Mining Co. v. Lewis* (1879), 4 C. P. D. 396, LINDLEY, J., at p. 407, remarks that "a person . . . may be a promoter of a company which is already in existence, but the capital of which is not yet taken up, and which is not yet in a position to perform the obligations imposed upon it by creditors." Cp. *Ladywell Mining Co. v. Brookes, sup.* (per LINDLEY, L.J., at p. 414, and LOPES, L.J., at p. 415), and the observations of the same two Lords Justices at p. 372 of *Eden v. Ridsdale's Railway Lump and Lighting Co.* (1889), 23 Q. B. D. 368, C. A.

in that one of the many possible proceedings of this nature which relates to the prospectus. The promoter must be shown to have been "a party to the preparation of the prospectus, or of the portion thereof containing the untrue statement." "*The prospectus*" and "*the untrue statement*," obviously mean the prospectus, and the statement, respectively, on which the representee founds his action. The defendant may have taken part in framing any number of prospectuses other than the one sued upon, or he may have concocted, or assisted in concocting, any number of untruths contained therein other than that complained of; but, if he took no part in the preparation of the particular prospectus, or portion thereof, which gives the plaintiff his cause of action, he escapes the statutory liability, unless, of course, he can be shown to have issued the prospectus, or to have been a director, or named with authority as such, as well as a promoter. Moreover, here again, for the third time, the statute omits all reference to the reports or memoranda mentioned in the earlier part of the section; so that, though the promoter may have prepared the whole of a series of certificates or reports, accompanying, or incorporated with, the prospectus, and though these documents may be saturated with the falsehoods on which the action is based, yet, if he took no part in the preparation of the prospectus itself, he eludes responsibility under the statute.

369. Whether the promoter did or did not take part in the preparation of the prospectus is, like the question whether he was a promoter at all, one of fact (*u*). A company or artificial person may be a promoter of the company offering the shares or debentures for subscription (*x*), as well as a natural person.

370. It is expressly provided, in sub-sect. (5) of sect. 84, that the expression "promoter" is not to include "any person by reason" (which must mean "by reason only") "of his acting in a professional capacity for persons engaged in procuring the formation of the company." This proviso is as ridiculously unnecessary as would be a proviso in a statute codifying the law of contracts which should solemnly proclaim, for the comfort and consolation of professional and other agents, that a conveyancer who drafts a contract, or a clerk who transcribes or types it, shall not be deemed by reason thereof to be a contracting party. Clearly no person employed merely to put the ideas of the promoter into legal or literary shape, or merely to advise those engaged in forming the company on the law and practice appertaining to the subject, could possibly be held liable as a principal at common law, any more than he is rendered so liable by the statute (*y*); and, on the other hand, there is nothing in the language

(*u*) In *Greenwood v. Leathershod Wheel Co.*, [1900] 1 Ch. 421, C. A., KEKEWICH, J., found that one of the five defendants was a promoter who had been a party to the preparation of the prospectus within the meaning of the corresponding provisions of the Act of 1890. A useful illustration of the sort of acts which may be held to come within the description of "being a party to the preparation" is to be found in the judgment of KEKEWICH, J., in *Glazier v. Rolls, sup.*, at p. 442.

(*x*) In *Re Leeds and Hanley Theatre of Varieties, Ltd.*, [1902] 2 Ch. 809, C. A., the promoter was a company.

(*y*) See § 157 in Ch. VIII, Sect. 1, *ante*.

of the statutory proviso to exempt him from the responsibility which would attach to him at common law on his transcending those limits, and adding to, or substituting for, the duties of an agent the interest of a partner.

371. It will be noticed that no such special affirmative defence is given by the statute to the promoter class, as is available to the class of directors in fact, or persons named as such with authority in the prospectus.

Sub-sect. (4). What must be alleged and proved in the first instance by Persons entitled to maintain the Statutory Proceedings.

372. When the representee has shown that both the representation, and the parties to it, are within the ambit and purview of the enactment, he is in a position to maintain the proceedings for recovery of compensation, and to avail himself of the special privileges and exemptions, which it respectively authorizes and confers.

373. First and foremost amongst these privileges is the privilege of being able to establish a *primâ facie* (though not an irrebuttable) case for relief on proof of the mere untruth of the statement complained of, without the obligation, which would be incumbent on him in the case of an action at common law for damages (z), of proving fraud (a). The representee has to prove an "untrue statement" in the prospectus (b), but, in the first instance, he is not put to the proof of any belief, or non-belief, or other state of mind on the part of the representor (c). It is not apparent why the legislature has thought fit to substitute the expression "untrue statement," for the definite and well understood legal expression "misrepresentation," for each of them means neither more nor less than a representation which is untrue in fact (d); consequently the substitution is unnecessary, and, further, it is misleading, in that it has encouraged the contention that the difference in nomenclature must have been designed to indicate a difference in idea and conception,—a contention which is vain and has already been exploded (e).

374. In all other respects, the burden of proof which rests on the

(z) See Ch. X, Sect. 1, *ante*.

(a) See Ch. V, Sect. 1, as to the constituents of fraud, in relation to a misrepresentation.

(b) See, generally, the cases cited in the notes to this Sub-section. In all those where the untruth of the statement in point of fact was either proved or admitted, the plaintiff succeeded, or, if he failed, the failure was on other grounds: and in any case where the untruth was not established, the plaintiff's case disappeared *in limine*.

(c) See sect. 84 (1) of the Act of 1908.

(d) *Greenwood v. Leathershod Wheel Co.*, [1900] 1 Ch. 421, C. A., *per* LINDLEY, M.R., at p. 434.

(e) *Ibid.* The argument here—put forward with apparent gravity—was that "untruth" indicated only that kind of subjective, "contingent," or conscious untruth, which casuists, philologists, and Lord BRAMWELL, have descanted upon (as to which perversities see App. A, Sects. 4, 5); in other words, that "untrue" is the same as "fraudulent." If the term "misrepresentation" had been used by the legislature, this amazing construction, which, if effect were given to it, would obviously massacre the whole intent and purpose of the enactment, could never have even been suggested.

statutory representee's shoulders is either precisely, or substantially, the same as that which is incumbent on a representee in a common law action for damages (*f*). Thus the alleged "statement" in the one case must be shown to be something which in law amounts to a "statement," just as, in the other, the alleged representation must be something which is deemed a representation in law (*g*). And the "untruth" or "falsity," for the purposes of the statutory proceedings, must be shown to have been substantial (*h*), and to have existed down to the date of allotment, which is the date of the representee's alteration of position (*i*), and the statutory "statement" is subject to the same canons of construction, for the purpose of ascertaining its truth or falsity, as the common law "representation" (*k*). Thus a "statement," like the common law "representation," may be rendered "untrue" by mere omission or suppression of qualifying circumstances or documents (*l*), as much as when it consists of an express misstatement that the only documents or facts required to be disclosed by other provisions of the statutory law relating to companies are as enumerated in the prospectus (*m*); and, where there are several statements or documents, they must be considered in their entirety and bearing upon one another, rather than in severalty and isolation (*n*). Lastly (passing by, for the moment, the questions of materiality and inducement, as to which there is a slight apparent difference of judicial opinion), it is incumbent on the representee to prove "loss or damage," and a causal *nexus* between that damage and "the untrue statement," or rather between the damage and the alteration of his position (by subscribing for shares) induced by such "untrue statement" (*o*).

(*f*) See Ch. X, Sect. 1, *ante*.

(*g*) See Ch. II, *ante*. Of course Ch. III, Sect. 1 (so far as relates to express oral representation), and Sect. 2 (implied representation by acts and conduct), have no application to the statutory cause of action.

(*h*) See Ch. IV, Sect. 2, *ante*. In *Brookes v. Hansen*, [1906] 2 Ch. 129, the statement was not "substantially" untrue (pp. 137, 138).

(*i*) See Ch. IV, Sect. 3, *ante*.

(*k*) See Ch. IV, Sect. 4, *ante*.

(*l*) As in *Drincqbier v. Wood*, [1899] 1 Ch. 393, *per* BYRNE, J., at p. 407 ("I think the statements in the prospectus . . . to which I have referred are, under the circumstances of the case, having regard to what was not disclosed, in themselves untrue"), and *Greenwood v. Leathershod Wheel Co.*, [1900] 1 Ch. 421, C. A. (*per* LINDLEY, M.R., at pp. 433, 434, and ROMER, L.J., at pp. 438, 439). See Ch. IV, Sect. 4, Sub-s. (2), *ante*.

(*m*) The misrepresentation made in *Drincqbier v. Wood*, *ubi sup.*, and *Greenwood v. Leathershod Wheel Co.*, *ubi sup.*, might be regarded as express, from this point of view, as well as implied. Similar express misstatements were made in *Shepherd v. Broome*, [1904] A. C. 342, H. L. (see the observations of Lord LINDLEY at p. 347), and *Shepherd v. Bray*, [1906] 2 Ch. 235 (*per* WARRINGTON, J., at p. 250). The "documents and facts" referred to in the text are the contracts, documents, and facts, the disclosure of which in the prospectus is prescribed by sect. 38 of the Companies Act, 1867, and sect. 81 of the Act of 1908, which supersedes that enactment.

(*n*) *Drincqbier v. Wood*, *sup.*, *per* BYRNE, J., at p. 403, and *Brookes v. Hansen*, *sup.*, *per* JOYCE, J., at p. 137. Cp. Ch. IV, Sub-s. (3), *ante*.

(*o*) Cp. Ch. VII, *ante* (alteration of position and damage), with sect. 84 (1) of the Act of 1908, in which is to be found the absurdly elliptical expression—"loss or damage sustained by reason of any untrue statement," as if the untrue statement of itself could cause anything. Cp. the equally ridiculous definition, adopted in many treatises and judgments, of defamatory matter as matter which tends to injure

375. It has been explained that in a common law action for deceit both inducement and materiality must be shown by the representee (*p*). Substantially, the same onus rests on the shoulders of the plaintiff in the statutory proceedings for compensation; that is to say, he must establish that he was in fact induced to subscribe for the shares or debentures by his belief in the truth of the statement found to be untrue (*q*); also, unless admitted (as it often is), he must show that the statement was of a nature to produce that effect, in the sense that a disclosure of the real truth "reasonably would deter, or tend to deter, an ordinarily prudent investor" from subscribing, or "might influence him" in considering whether to do so or not (*r*); in other words, that the statement had some materiality (*s*). If the legislature had thought fit to use well-understood technical terms in drafting the enactment, such as "all persons who were induced to subscribe for any shares or debentures by any material untrue statement," etc. (*t*), no doubt or difficulty whatever would have arisen; but, notwithstanding their presumed knowledge of the debates and logomachies which had been created by departing from common-law phraseology and substituting for it the dubious formula "on the faith of the prospectus" in sect. 38 of the Companies Act, 1867, they repeated the latter expression in 1908, after having abolished the section in which it had originally appeared, and so, notwithstanding the opportunity of starting anew with intelligible language, they deliberately set up again and perpetuated the old source of error and confusion. The consequence is that the same question has arisen, inviting and creating the same differences of opinion, as to the meaning of "on the faith of the prospectus" in reference to the untrue statements which are the subject of the Act of 1890, s. 3 (1), and the

reputation. In each case, of course, it is not the statement, but its communication to and influence on the mind of another, which produces the injury. In *Stevens v. Hoare, inf.*, amongst other grounds for the dismissal of the action was failure to prove damage (p. 409).

(*p*) See Ch. VI, *ante*, as to what inducement and materiality respectively mean, and as to the burden of proof in relation thereto in any non-statutory proceedings based upon misrepresentation.

(*q*) In many of the cases under the Act of 1890, the fact of inducement was not challenged: but in at least three it was the subject of dispute. In two of these it was found as a fact, and the plaintiff succeeded: *Drincqbier v. Wood, sup.* (per BRYNE, J., at pp. 402-404), and *J. & R. Coats, Ltd. v. Crossland* (1904), 20 T. L. R. 800, per SWINFEN-EADY, J., at p. 806. On the other hand, in *Stevens v. Hoare* (1904), 20 T. L. R. 407, JUDGE, J., found that the plaintiff was not induced to subscribe by his belief in the representation in the sense which he put upon it at the time—cp. Ch. VI, Sect. 1, Sub-s. (4), *ante*, on this point—and on that ground, amongst others, the plaintiff failed.

(*r*) *Shepherd v. Broome*, [1903] 1 Ch. 586, C. A. The expressions quoted in the text are those of BUCKLEY, J., at p. 604, and ROMER, L.J., at p. 627, with which compare the observations of COLLINS, M.R., at pp. 620-622. The decision itself was affirmed [1904] A. C. 342, H. L.; and the views of COLLINS, M.R., and ROMER, L.J., were adopted and applied by WARRINGTON, J., at pp. 250-253 of *Shepherd v. Bray*, [1906] 2 Ch. 235.

(*s*) See Ch. VI, Sect. 2, *ante*.

(*t*) Or even "by any untrue statement," for the courts would have read into this expression the qualification "material," as they read it into the wholly unqualified expression "contracts" in the now repealed sect. 38 of the Companies Act, 1867.

Act of 1908, s. 84 (1), as had previously arisen on the meaning of these words with reference to omitted contracts in sect. 38 of the Act of 1867. Subscription “on the faith of the prospectus”—an elliptical and inaccurate phrase (*u*)—has been decided to indicate, in the one case, subscription on the faith that there were no material contracts other than those disclosed therein (*x*), and, in the other, subscription on the faith that the statement therein which is the subject of complaint was substantially true (*y*). So that the authorities on the one enactment are equally authorities on the other, so far as regards the topic of inducement, and the construction of the particular expression referred to. And a question which has been much debated in both classes of authority, and has given rise to divergences of expression manifested in different judgments, and sometimes even in the same judgment, is this—must the plaintiff prove that, if the existence of the contract in the one case, or the true state of the facts, in the other, had been revealed to him at the time, he *would* not have taken the shares, or is it enough to establish that he *might* not have done so? Must the effect be shown to have been certainly prohibitive, or only probably or possibly deterrent? The former would seem to have been the opinion of COCKBURN, C.J. (*z*), THESIGER, L.J. (*a*), VAUGHAN WILLIAMS, L.J. (*b*), FARWELL, J. (*c*), Lord HALSBURY, L.C. (*d*), and Lord LINDLEY (*e*); the latter, that of COLLINS, M.R. (*f*), and ROMER, L.J. (*g*). *Non nostrum est tantas componere lites*; but, if there is any conflict, other than verbal, between these eminent authorities, it is perhaps reconciled in Lord LINDLEY’s exposition of the rules applicable to cases of non-disclosure of contracts (for his observations are equally applicable, and may easily be adapted, to cases of “untrue statements”) as to the onus incumbent on the plaintiff. “Proof that he applied for shares on the faith of a prospectus which . . . etc., and that he obtained them and paid for them and lost his money, is *primâ facie* evidence, but only *primâ facie* evidence, of damage. . . . But, if the plaintiff is challenged on this point, he must

(*u*) *Cackett v. Keswick*, [1902] 2 Ch. 456, C. A., *per* FARWELL, J. (whose decision was affirmed by the C. A.), at p. 463.

(*x*) *Sullivan v. Mitcalfe* (1880), 5 C. P. D. 455, C. A., *per* THESIGER, L.J., at p. 460.

(*y*) *Cackett v. Keswick*, *sup.*, *per* FARWELL, J., at p. 463: “I apprehend that in this respect the same principles must apply to the omission of a material fact as apply to the insertion of an untruth in the prospectus.” See also note (*f*), *inf.*, as to what COLLINS, M.R., said in *Broome v. Speak*, *inf.*

(*z*) *Twycross v. Grant*, No. 1 (1877), 2 C. P. D. 469, C. A., at p. 543.

(*a*) *Sullivan v. Mitcalfe*, *sup.*, at p. 460.

(*b*) *Nash v. Calthorpe*, [1905] 2 Ch. 237, C. A., at pp. 244–246.

(*c*) *Cackett v. Keswick*, *sup.*, at pp. 463, 464.

(*d*) *Macleay v. Tait*, [1906] A. C. 24, H. L. (a case which involved the same company, and the same prospectus, as those which were the subject of the case last cited), at p. 26.

(*e*) *Ibid.*, at pp. 28–34.

(*f*) *Broome v. Speak*, [1903] 1 Ch. 586, C. A., at pp. 620–622. This case was one in which the plaintiff relied upon the Act of 1890, as well as sect. 38 of the Act of 1867, and COLLINS, M.R., after dealing with the claim under sect. 38, says (at p. 623): “it seems to me unnecessary to consider the case under the Directors’ Liability Act, 1890. I do not know that any material distinction can be made for the present purpose between the two Acts.”

(*g*) *Nash v. Calthorpe*, *sup.*, at pp. 251, 252.

go a step further and prove that he was misled by what makes the prospectus fraudulent, *i.e.* the omission to disclose some document which ought to have been disclosed" (*h*) [in a case under the Act of 1890, or the enactment of 1908, the language would be,—“by what makes the prospectus amenable to the statutory proceedings, *i.e.* the statement therein which is alleged to be untrue”].

Sub-sect. (5). Statutory Grounds of Excuse and Affirmative Defences.

376. Where the plaintiff has alleged or proved the untruth of any statement in the prospectus, and the other matters required to establish a *primâ facie* case under the statutory proceedings, the burden is then transferred to the defendant's shoulders, and it becomes from that point incumbent on him to allege in his pleading with particulars, where necessary (*i*), and, having alleged, to prove each and every of the facts indicated in the statute as necessary and sufficient to displace such *primâ facie* case. These facts are, broadly, such as to show that the statement, though untrue in fact, was made without dishonesty or negligence. Innocence—in the extended sense of the word which results from the provisions of the enactment—is protected as much as innocence in the more restricted sense is at common law, and, apart from this enlarged connotation, the only difference between the two classes of case—but a difference of scarcely less importance—is that, whereas in an ordinary action of deceit the plaintiff must prove fraud as well as falsity, or else submit to a non-suit, it is for the defendant in the statutory action, when once it is shown that he has made a misrepresentation to the prejudice of another, to establish his innocence (*k*). A statutory misrepresenter cannot hope, as he could in the ordinary type of case, and often not without good warrant, to succeed on the defects of the plaintiff's evidence and on the difficulties in proving the state of another's mind; he must succeed, if at all, on his own positive and personal merits. Where the evidence is evenly balanced, this provision must have a vital bearing on the result, for it is then the defendant, and not, as in actions of deceit, the plaintiff, who must suffer from the evidence being left in a state which is consistent with either view of the morality of the misrepresentation. But, further, in shifting the burden at this point on to the defendant, the legislature has also increased it by adding the element of reasonable care to that of honesty, as the two necessary constituents of innocence. In the non-statutory proceedings, falsity alone, though coupled with negligence, does not even inculcate the representer; in the statutory proceedings, falsity alone does inculcate him, and he can only exculpate himself by proof both of

(*h*) At p. 31 of *Macleay v. Tait*, *sup.*

(*i*) The only necessity for such particulars would seem to be in the case of “the reasonable grounds of belief,” as to which see § 378, *inf.*

(*k*) This is involved in the expression “unless it is proved,” which in sect. 84 (1) is interposed between the statement of the facts requisite to establish a *primâ facie* case, and those which are sufficient to negative it.

actual belief, and of that which, in all cases not within the statute, is wholly irrelevant (*l*), viz. reasonable grounds for that belief.

377. The enactment distinguishes between statements at first-hand, that is, statements "not purporting to be made on the authority of an expert, or of a public official document or statement," and statements at second-hand, that is, statements which do purport to be so made (*m*). It is to be gathered from the use of the expression "purport to be made" that statements in fact made on the authority of an expert, but not declared or avowed, or appearing on the face of the prospectus as such, are to be deemed first-hand statements; and this is not at all unreasonable, since, by withholding the name of the person from whom the information or opinion is derived, and the fact that is so derived, the director or other person sought to be made liable adopts it as his own. Further, since it is enacted that "the expression 'expert' includes engineer, valuer, accountant, and any other person whose profession gives authority to a statement made by him" (*n*), it follows that any statement purporting to be made on the authority of any person who may be held or found not to be so qualified, would be deemed a first-hand statement, and so would a statement purporting to be based on a document or statement which may be held or found to be "public" without being "official," or "official" without being "public," or neither the one nor the other. There is no statutory definition of either of these terms. The grounds of immunity or excuse in the case of first-hand statements, as above defined, are distinct from the grounds available where the statement is second-hand, and, moreover, they are exclusive of one another.

378. To take, first, the class of statement at first-hand,—the enactment provides that in order to negative his *prima facie* liability, the defendant must prove "with respect to every untrue statement (*o*) not purporting to be made on the authority of an expert, or of a public official document or statement, that he had reasonable grounds to believe, and did up to the time of allotment of the shares or debentures, as the case

(*l*) See Ch. V, Sect. 2, Sub-s. (2), *ante*.

(*m*) One would imagine that having used this form of words, with a "not" prefixed to them, to indicate the first class of statement, the legislature would, in describing the second class, use precisely the same language, without prefixing the negative: but it is not so. A different and more detailed formula is used, viz. "purporting to be a statement by, or contained in what purports to be a copy of or extract from a report or valuation of an expert." Since the enactment is obviously aiming at dichotomy, and the division of every possible kind of "untrue statement" in a prospectus into two mutually exclusive classes of "Not-A," and "A,"—what are we to understand by this change of phraseology, "A," in the "Not-A's" being described in one set of words, and the same "A," in the "A's," being described in another? In this, as in so many other instances, already pointed out, the legislature seems to have been afflicted with a total oblivion of everything it has said the moment before, and a feminine garrulity, which, unpardonable as it was even in the throes of parturition in 1890, was doubly so when its progeny had almost attained its majority in 1908, and an opportunity was given of correcting the mistakes of its infancy.

(*n*) This is the definition given at the end of sub-s. (5) of sect. 84.

(*o*) Which, it will be remembered, includes untrue statements not only in the prospectus itself, but also "in any report or memorandum appearing on the face thereof, or by reference incorporated therein, or issued therewith."

may be, believe that the statement was true" (*p*). Where both belief in fact, and the existence of reasonable grounds is established, the defendant makes out his defence (*q*). But it is of no avail to prove one without the other. Actual and honest belief may obviously exist without reasonable grounds; and it is conceivable, though no case of this description has yet come before the courts, that a defendant might, after proving the existence of excellent reasons for believing the statement, fail to establish that he in fact did believe it. It is just as common a tendency in human nature to distrust "confirmations strong as holy writ," as it is to put faith in "trifles light as air." At any rate the legislature has contemplated the possibility of such a case, for otherwise it would have been unnecessary to add any words after "had reasonable grounds to believe." Though the section mentions the "reasonable grounds" first, and the fact of belief afterwards, the usual, and the logical, course adopted at the hearing is for the defendant first to establish, if he can, that he believed in fact, and then, if he surmounts this barrier, to show that he did so with good reason. Where the initial step has not been made good, and the representor fails to show that he even actually, or honestly, credited his own statement, there is no necessity to embark upon the other inquiry, or, if pursued, it is unnecessary to pronounce upon it; the defendant fails at his first fence, and therefore fails altogether (*r*). What actual and honest belief means has already been considered (*s*); whether it exists or not is a question of fact (*t*). Where, having proved, or at least having made a *prima facie* case of belief in fact, the defendant is unable to establish that he did so upon reasonable grounds, he equally fails (*u*). What are reasonable grounds is also a question of fact (*x*). "Reasonable" means "reasonable in all the circumstances of the case"; it does not necessarily mean "sufficient,"

(*p*) See sect. 84 (1), (*d*) of the Act of 1908.

(*q*) As in *Stevens v. Hoare* (1904), 20 T. L. R. 407 (*per* JOYCE, J., at p. 409), and *Brookes v. Hansen*, [1906] 2 Ch. 129 (*per* JOYCE, J., at p. 137).

(*r*) The defendant failed to establish belief in fact in *Greenwood v. Leathershod Wheel Co.*, [1900] 1 Ch. 421, C. A. (*per* LINDLEY, M.R., at pp. 433, 434, and ROMER, L.J., at pp. 438, 439); *McConnell v. Wright*, [1903] 1 Ch. 546, C. A. (*per* COLLINS, M.R., at pp. 551, 552, ROMER, L.J., at p. 555, and COZENS-HARDY, L.J., at pp. 558, 559); and *J. & R. Coats, Ltd. v. Crossland* (1904), 20 T. L. R. 800 (*per* SWINFEN-EADY, J., at p. 806).

(*s*) See Ch. V, Sect. 2, Sub-s. (1), *ante*. In *J. & R. Coats, Ltd. v. Crossland*, *sup.*, SWINFEN-EADY, J., expressed the opinion that one who deliberately abstains from inquiry "can have no real belief in the truth of what he says," that is to say, can have no honest, even if (in one sense) he may be described as having an actual, belief.

(*t*) See the cases cited in the last two notes.

(*u*) The defendant failed in establishing this second element in the defence (though he established, or was assumed to have established, the first) in *Thomson v. Lord Clanmorris*, [1900] 1 Ch. 718, C. A. (at p. 730); in *Broome v. Speak*, [1903] 1 Ch. 586 (*per* BUCKLEY, J., at p. 603, COLLINS, M.R., at pp. 619, 620, and ROMER, L.J., at p. 627); and in the same case in the H. L., *sub nom.* *Shepherd v. Broome*, [1904] A. C. 342, H. L. (*per* Lord JAMES at p. 346, and Lord LINDLEY at p. 347).

(*x*) For illustrations of grounds which were not deemed reasonable, see the judgments of the C. A. in *Peck v. Derry* (1887), 37 C. D. 541, C. A., and of KEKEWICH, J., in *Glazier v. Rolfs* (1889), 42 C. D. 436, which judgments, though reversed by the H. L. and the C. A., respectively, on the ground that absence of reasonable grounds is irrelevant to the common law action, are obviously in point for the purposes of a statute which makes that absence relevant.

or what the tribunal may deem so; nor does it necessarily exclude a reliance upon the judgment or advice of others (*y*), but, where reports and communications of third persons are suggested as reasonable grounds, it must be clearly proved that they existed at the time in a shape which would justify the statement (*z*), and when the opinion of counsel is put forward as a reasonable ground, it must be shown that the opinion was based on full information, and directed to the very point (*a*). The precise nature of the alleged "grounds" must, if the plaintiff requires it, be the subject of particulars (*b*). Though the belief itself must be shown to have continued to the date of allotment (*c*), the enactment omits—another of its extraordinary defects—to prescribe the like continuance of the reasonable grounds (*d*); so that if the defendant in fact believed the representations to be true during the whole of the period mentioned, and at any time had reasonable grounds for his belief, he escapes the statutory liability, even if at the date of allotment he had no reasonable grounds, or no grounds at all.

379. The other class of untrue statements, viz. those made at second-hand, is the subject of a totally different ground of excuse altogether. In this type of case it is neither sufficient, nor necessary, for the defendant to allege and prove, as a means of escape from his *prima facie* liability, that he in fact and reasonably believed in the truth of the statement. The section divides the class in question into two species: first, "every untrue statement purporting to be a statement by, or contained in what purports to be a copy of or extract from a report or valuation of, an expert" (*e*); and, secondly, "every untrue statement purporting to be a statement made by an official person, or contained in what purports to be a copy of or extract from a public official document" (*f*).

380. With respect to the first of these two species, it is provided that a defendant is excused on proof "that it" (sc. the untrue statement which is the subject of the action) "fairly represented the statement" (sc. the statement made by the expert), "or was a correct and fair copy of or extract from the report or valuation. Provided that the director, person named as director, promoter, or person who authorized the issue of the prospectus, shall be liable to pay compensation as aforesaid if it is proved that he had no reasonable grounds to believe that the person making the

(*y*) *Stevens v. Hoare, sup., per JOYCE, J.*, at p. 409.

(*z*) *J. & R. Coats, Ltd. v. Crossland, sup., per SWINFEN-EADY, J.*, at pp. 803, 806.

(*a*) *Broome v. Speak, sup., per COLLINS, M.R.*, at p. 619.

(*b*) *Alman v. Oppert*, [1901] 2 K. B. 576, C. A.

(*c*) In this respect, the statute does not depart from the common-law rule: see Ch. IV, Sect. 3, *ante*.

(*d*) The actual words are: "that he had reasonable grounds to believe, and did up to the time of the allotment, etc., believe . . ." To effect what was, or ought to have been the intention of the legislature, the words should have been: "that, up to the time of allotment, etc. . . he had reasonable grounds to believe, and did believe," or, more simply "that, up to the time of allotment, he actually and reasonably believed," etc.

(*e*) This is sect. 84, Sub-s. (1), (*b*), of the Act of 1908.

(*f*) *Ibid.*, sub-s. (1), (*c*).

statement, report, or valuation was competent to make it" (g). The significance of the word "purporting," which qualifies the whole of the above provision, has already been commented upon (h). The enactment effects a slight, but not unimportant, variation in the common law rules of evidence as to professedly second-hand or hearsay representations. In the ordinary action of deceit, no less than in the statutory action, a fair reproduction of an opinion or report given or made by a third person, avowedly as such, is not a misrepresentation merely because the opinion or report is incorrect; it is only so, if the representation (express or implied) that there has in fact been such an opinion, etc., and substantially as reproduced, is proved to be false (i). And so it is by the statute. But the burden of proof is altered. And this alteration is of considerable practical significance. For whereas at common law the representee, on proving untruth in an avowedly derivative statement, would have proved nothing—not even a *prima facie* case; in the statutory proceedings he is, on such proof, without going further, entitled to call for an answer, and put the representor to the proof that it was a fair and impartial representation of everything material which had been said or written by the expert. But even then, if the representee can establish—and the onus is for that purpose thrown back on him—that the representor had no reasonable ground to believe in the competency of the expert to make the report or valuation, the statement is left entirely unprotected, and the representor is deprived not only of this, but of every other possible statutory immunity.

381. It will be noticed that the section refers to two sub-species of this first species of "untrue statements made on the authority of an expert," viz. (i) statements purporting to be statements by the expert—this must be intended to refer to oral statements, or informal written statements, a version or summary or abstract of which purports to be given in the prospectus; and (ii) statements contained in what purports to be a copy of, or extract from, a report or valuation of an expert, which provision is obviously confined to documents only, set out in the prospectus itself, or constituting or contained in any report or memorandum incorporated by reference therein, or issued therewith. In both the one case and the other, what the representor has to establish is that his reproduction was an impartial and honest one; that is to say, that, whether it purported to be a repetition or copy, or a summary, abstract, or extract, it was either a complete and textual transcript, or, if not a complete re-statement *totidem verbis*, it was a faithful version, ungarbled by interpolations of favourable, and unemasculated by omissions of unfavourable, matter. In fact, a defendant under the circumstances in question, must adduce precisely the same kind of proof, in order to obtain immunity, as a defendant in an action of defamation would have to adduce in support of a plea of "fair and accurate report" of judicial proceedings (k). Two comments must be made on this

(g) *Ibid.*, sub-s. (1), (b).

(h) See § 377, *sup.*

(i) See Ch. II, Sect. 3, Sub-ss. (2) and (3), *ante*.

(k) See the author's *Law of Actionable Defamation*, Article 35 (vi), and notes thereto. Cp. also, generally, § 85, *ante*, as to misrepresentation by omission of qualifications.

part of the enactment : first, that the term “ expert ” is limited to one whose *profession* gives authority to a statement made by him (*l*), leaving out all those whose *business* gives such authority (*m*), and—worst of all—leaving out men of business connected with the very enterprise which the company may be formed to acquire and work—which would appear to be an injustice to the defendant ; and, secondly, that a defendant escapes *statutory* liability if the statement was a fair reproduction of the original, though the original itself may have been grossly dishonest, or the defendant may even have bribed the expert to make it, and not have believed that a word in it was true ; for the representee, under the enactment, can only fix the representor with liability on proof that he had no reasonable ground to believe that the expert was competent to make the valuation, report, or statement, and “ competency ” only includes the competency arising from general professional skill, diligence, and experience, and, probably also, that arising from knowledge and investigation of the particular property or undertaking which is the subject of the prospectus. It cannot possibly include honesty (*n*). A man who fabricates a lying report or valuation, or manufactures figures, is not correctly described as “ incompetent ” in that respect. Of course, it may be said that, on proof of such facts as the above, a representee would succeed in an action of deceit, and has no need of the statute, and that, though the burden in that case would be on him of proving dishonesty, so is it also on him, under the statute, of proving incompetence. This is true, but it is suggested that, to effectuate the policy of the legislature, or what ought to have been their policy, no burden at all should have been imposed on the representee beyond proving the untruth of the statement, in the first instance, and that, on such proof, the entire onus should at once be shifted on to the shoulders of the representor to show that not only did he fairly reproduce the expert’s statement, but that he reasonably believed that such expert was competent in point of skill and experience to make it, and in fact made it in good faith, and with full knowledge of all the material facts.

382. The defence, or ground of excuse, available to a defendant in the case of the second of the above-mentioned species of untrue statements at second-hand, is “ that it ”—sc. the untrue statement complained of—“ was a correct and fair representation of the statement ”—sc. the “ statement made by an official person ” which the “ untrue statement ” purported to be—“ or copy of or extract from the document ”—sc. the “ public official document ” in a professed copy of or extract from which the “ untrue statement was contained ” (*n*). There is here the same obligation on the defendant to show a fair and honest reproduction, and the same division of the “ untrue statements ” into those which purport

(*l*) See the definition in sect. 84 (5) of the Act, cited in § 377, *sup*.

(*m*) This view was elaborated by the author, in 1890, at pp. 119–121 of his work on the *Directors’ Liability Act*. The same opinion is expressed in Buckley’s *Companies Acts*, in the notes to sect. 84.

(*n*) See sect. 84, sub-s. (1), (*c*), of the statute.

to be the statements of the third person, and those which are contained in what purports to be a copy of, or extract from, documents. Again, the qualification introduced by the word "purporting" is significant (*o*); and, generally, the observations already made with reference to the first species of derivative untrue statements (*p*) are, with the substitution of "official person" for "expert," and "public official document" for "report or valuation of an expert," equally applicable to the second species, except that, in the latter case, no question of "competence" arises, and it is not open to the plaintiff to destroy the defendant's immunity by allegation and proof that the "official person" was not competent to discharge the duties of his office. The term "official person" presumably includes any person holding an appointment under the State, or exercising any office of public or local administration, or discharging duties to the community, or any section thereof pursuant to statute, charter, letters patent, or other lawful authority of the like description, as distinguished from persons owing a merely private duty to individuals in virtue of professional or contractual relations. A statement by such a person would appear to include an oral statement, if made officially, as (*e.g.*) a statement by a minister in Parliament, or by a judge in court. The "documents" referred to in the section must be both public and official; a document which is public, without being also official, such as a newspaper, historical work, or dictionary, or encyclopædia, is not within the enactment; nor is an official document which is not also "public," such as a private State paper. A "public official document" includes at least all such documents as are *publici juris* for the purposes of the law of evidence. The characteristics, according to Lord BLACKBURN, of any such document are that it should be "a document that is made for the purpose of the public making use of it, and being able to refer to it," and should "be made by a public officer" (*q*); and he goes on to point out that by "the public" is not necessarily meant "the public at large," and that the expression includes any section of the community (*r*). A question may hereafter arise whether a statement made, or document issued, to the public by a public officer of a foreign State, or a British Colony, in the discharge of his duty, as such officer, according to the law of the State or Colony (*s*), would be within the true interpretation of the expressions under discussion. It is submitted that they would not; and that, where a British statute speaks of "official" or "public," it must be taken to contemplate only British officers and officials and the British public. And

(*o*) See § 377, *sup.*

(*p*) In §§ 380, 381, *sup.*

(*q*) At p. 643 of *Sturla v. Freccia* (1880), 5 App. Cas. 623, H. L.

(*r*) *Ibid.*

(*s*) Such, for instance, as the report of the Colonial Government Surveyor on which the prospectus in *Re Mount Morgan (West) Gold Mine, Ltd., Ex parte West* (1887), 56 L. T. 622, purported to be founded, and the various foreign "official" documents which figure so prominently in prospectuses of companies formed to acquire mines, concessions, or properties abroad.

it could hardly have been intended that the presumption in favour of the "competence" of British officials which was presumably the reason for not permitting a plaintiff to allege or prove that the defendant had no reasonable ground to believe in its existence, was to extend to the officials of a foreign State.

383. Except as above stated, a defendant in the statutory action is not deprived of any of the affirmative defences which would be available to him in any action for tort, or of any of the five affirmative pleas, special to actions of deceit, which have already formed the subject of discussion (*t*), except the fifth of them, which obviously has no application. It is even conceivable, though wildly improbable, that the second of these pleas admits of being resorted to (*u*), that is to say, that a defendant in the statutory proceedings may be in a position to prove that the plaintiff expressly agreed to waive the statutory compensation payable in respect of untrue statements, for *unusquisque potest renunciare juri pro se introducto*. It is true that all "waiver clauses" have been rendered invalid by sect. 81, sub-sect. (4) of the Act of 1908, so far as they purport to bind any applicant for shares or debentures to waive compliance with any of the requirements of *that section*, which relates to the contracts, documents, and matters to be disclosed in the prospectus; but there is nothing in the Act rendering void any agreement to waive compliance with the requirements of sect. 84, or any section except sect. 81. It is just possible, therefore, that at some future time the attempt may be made to extract such a condition from the applicant, and to enforce it. Indeed it would appear that in one case a sort of faint-hearted experiment in this direction was actually made, under cover of the words "or otherwise" tacked on to a clause requiring applicants to waive any violation of sect. 38 of the Act of 1867, the predecessor of the now substituted sect. 81 of the Act of 1908 (*x*). Any agreement to waive damages for fraudulent misrepresentation would, as has been pointed out, probably be deemed a nullity (*y*); but the statutory compensation does not necessarily involve fraud; so that, if any person issuing, or responsible for, a prospectus, could be found audacious enough to propose, and any applicant for shares fatuous enough to accept, an express condition that, should any untrue statement of whatever kind, not being fraudulent, appear in the prospectus, no resort is to be made to the statutory remedy, it is difficult to give any sound reason why such an agreement should not be valid and enforceable, always providing that the agreement itself was not procured by any trickery or overreaching (*z*).

(*t*) See Ch. X, Sect. 2, *ante*.

(*u*) This is the subject of Ch. X, Sect. 2, Sub-s. (2), *ante*.

(*x*) See *Greenwood v. Leathershod Wheel Co.*, [1900] 1 Ch. 421, C. A., at pp. 436, 437.

(*y*) See § 213 in Ch. X, Sect. 2, Sub-s. (2), *ante*.

(*z*) As was the "tricky" and "catching" condition in *Greenwood v. Leathershod Wheel Co.*, *sup.* On the other hand, in *Mackay v. Tait*, [1906] A. C. 24, H. L., a waiver clause, in respect of sect. 38 of the Act of 1867, was held honest and enforceable, though there was in that case no need to enforce it (*per* Lord HALSBURY, L.C., at p. 27, and Lord LINDLEY at p. 34).

Sub-sect. (6). The Statutory Remedy.

384. The enactment provides that the statutory representors "shall be liable to pay compensation for the loss or damage sustained" by the statutory representees (*a*). Since "compensation" means neither more nor less than "damages" (*b*), and "damage" is related to "loss" as genus to species, the intention of the section could have been more simply expressed by saying that the defendants in the statutory action shall be liable in damages (*c*). It has already been pointed out that proof of damage, and of its causal connection with the misrepresentation, is just as necessary to establish the statutory, as it is to establish the common law, right to relief (*d*). Further, the rules for computing the quantum of relief, and as to the facts and matters relevant to such assessment, which are applicable in the case of an action of deceit (*e*), are precisely those which are applicable, and have been judicially applied, in the case of the statutory proceedings (*f*).

Sub-sect. (7). Miscellaneous Points in connection with the Statutory Procedure.

385. It remains to notice certain miscellaneous matters in connection with the statutory procedure, such as the rules as to joinder of causes of action, Statutes of Limitation, parties, and the right of indemnity and contribution between persons liable.

386. There is nothing in the pleading rules of the Supreme Court (see Ord. 16) which prevents the joinder of the statutory cause of action under sect. 84 of the Act of 1908 with other causes of action, both statutory and non-statutory, against the same defendants, or even against several defendants, though different remedies are sought against the different persons sued, provided that the one common grievance and ground of complaint is a prospectus in which there is alleged to be either misrepresentation, or non-disclosure of material facts, or both (*g*).

(*a*) See sect. 84 (1) of the Act of 1908.

(*b*) It has been so stated in some of the cases, and at any rate in all of them the identity is pre-supposed.

(*c*) Possibly, the word "compensation" was selected merely for the purpose of emphasizing the fact that the remedy is a statutory one.

(*d*) See § 374, *sup*.

(*e*) These rules are stated in Ch. X, Sect. 3, *ante*.

(*f*) See, for instance, *Thomson v. Lord Clanmorris*, [1900] 1 Ch. 421, C. A., cited in note (*g*) to § 231, *ante*; and *Broome v. Spcak*, [1903] 1 Ch. 586, C. A. (*per* BUCKLEY, J., at pp. 604-606, COLLINS, M.R., at pp. 622, 623, and COZENS-HARDY, L.J., at p. 630); and the same case in the H. L., *sub nom. Shepheard v. Broome*, [1904] A. C. 342, H. L. (*per* Lord LINDLEY at pp. 347, 348), cited in note (*h*) to § 233, *ante*.

(*g*) *Frankenburg v. Horsless Carriage Co.*, [1900] 1 Q. B. 504, C. A., where the plaintiff sued the defendant company for cancellation of his contract to take shares, and return of the moneys paid by him thereunder with interest, and rectification of the register, and the other defendants, four directors and the executors of a fifth, for compensation under the Act of 1890, and was held entitled to do so (*per* LINDLEY, M.R., at pp. 508, 509, and ROMER, L.J., at pp. 510-512). In this case *Gower v. Couldridge*, [1898] 1 Q. B. 318, C. A., was distinguished. So also in *Greenwood v. Leathershod Wheel Co.*, [1900] 1 Ch. 421, C. A., the plaintiff (see p. 424) successfully sued the company, its directors, and the promoter, claiming (1) against all of them,

387. The period of limitation during which the statutory action must be brought is six years, as in the case of any non-statutory action. It has been decided that sect. 3 of the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), which enacts (*inter alia*) that "all actions for penalties, damages, or sums of money given to the party grieved by any statute now or hereafter to be in force . . . shall be commenced and sued . . . within two years after the causes of such action or suits," was intended to apply to *penal* statutory causes of action only (*h*), and not to civil causes of action giving rise to statutory *compensation*, as the cause of action given by the enactment in question undoubtedly is (*i*). The period of limitation probably runs from the date of the plaintiff's subscription for the shares, when first his cause of action may be said to have accrued,—certainly not from the date of the issue of the prospectus (*k*).

388. As to parties, it seems that a number of shareholders or debenture holders may join in the statutory proceedings as plaintiffs (*l*); also that the executors of a deceased person who, if living, would be entitled to claim compensation, may institute or carry on, the proceedings (*m*). As regards the personal representatives of a deceased person who, if living, would be amenable to the provisions of the section, the question whether the rule *actio personalis moritur cum persona* has any application to the statutory cause of action, as it undoubtedly has in a common law action of deceit (*n*), has been elaborately discussed in two cases (*o*); but it so happened that in neither of them did it become necessary to pronounce any judgment on the point (*p*), which is accordingly still open (*q*). Another question which

a declaration, rescission, return of money, and rectification of the register, and (2) against the directors and promoter only, damages under sect. 38 of the Act of 1867, and also damages under the Directors' Liability Act, 1890.

(*h*) Such, for instance, as the cause of action in *Robinson v. Currey* (1880), 6 Q. B. D. 21, Div. Ct.

(*i*) *Thomson v. Lord Clanmorris*, *sup.*, per LINDLEY, M.R., at pp. 725, 726, and VAUGHAN WILLIAMS, L.J., at pp. 727, 728.

(*k*) *Ibid.*, per LINDLEY, M.R., at pp. 726, 727, and VAUGHAN WILLIAMS, L.J., at pp. 727, 728.

(*l*) *Dringbier v. Wood*, [1899] 1 Ch. 393, and see Ch. XV, Sect. 2, Sub-s. (2), *post*.

(*m*) In *Hoole v. Speak*, [1904] 2 Ch. 732, the executors of a deceased shareholder were the plaintiffs in the statutory proceedings. No one raised any objection.

(*n*) See Ch. X, Sect. 5, Sub-s. (2), *ante*.

(*o*) *Frankenburg v. Great Horseless Carriage Co.*, [1900] 1 Q. B. 504, C. A. (per LINDLEY, M.R., at p. 510, and ROMER, L.J., at pp. 511, 512), and *Shepherd v. Bray*, [1907] 2 Ch. 571, C. A.

(*p*) In the former case, because the matter came before the court on an interlocutory motion only, and, having decided that the action must proceed, the C. A. left this, together with all the other questions, to be decided at the trial, of which, however, if it ever took place, there is no report; in the latter case, because, after considerable argument on the question in the C. A., the appeal and action were settled. But, in the court appealed from, WARRINGTON, J., certainly assumed, indeed, he decided—see [1906] 2 Ch. 215, at p. 253—that an action under the statute was an *actio personalis* within the meaning of the rule.

(*q*) It is possible that, by their very Delphic pronouncement on hearing of the settlement in *Shepherd v. Bray*, *sup.*, the C. A. may have intended to intimate that they did not, as then advised, agree with the contention that the rule applies to statutory, as much as to other, personal actions for damages. Or they may have been referring to the contention that, though it does so apply, there is, nevertheless, a right of contribution against executors, see note (*g*), *inf.* It is impossible to say.

has been agitated, but again left undecided, is whether the statutory proceedings can be carried on against the estate of a bankrupt director, promoter, or person responsible for the issue of the prospectus (*r*).

389. By sect. 84, sub-sect. (3), of the Act of 1908, which reproduces sect. 4 of the Act of 1890, it is provided that "where the prospectus contains the name of a person as a director of the company, or as having agreed to become a director thereof, and he has not consented to become a director, or has withdrawn his consent before the issue of the prospectus, and has not authorized or consented to the issue thereof, the directors of the company, except any without whose knowledge or consent the prospectus was issued, and any other person who authorized the issue thereof, shall be liable to indemnify the person named as aforesaid against all damages, costs, and expenses to which he may be made liable by reason of his name having been inserted in the prospectus, or in defending himself against any action or legal proceedings brought against him in respect thereof." The greater part of this enactment is futile and senseless. For, under the conditions named, the class of person who is to be indemnified can never be "made liable" to any "damages, costs, or expenses," or anything else, since under the other provisions of the section he would, in the circumstances mentioned, be entitled to complete immunity, and no judgment could be pronounced against him (*s*); consequently there would be no "making of him liable," and no judicially declared liability, against which he would require to be indemnified. He might, however, incur expense and costs (but, even here, not "damages") in defending himself against a pauper plaintiff, and it must be supposed that this kind of "costs and expenses" is contemplated in the concluding words of the enactment, which may thus acquire a meaning, though "made liable" is certainly not an expression appropriate to such a case. Moreover, a right of indemnity to this extent, and in this respect, would probably exist at common law, because *ex hypothesi* the persons claiming the indemnity would not be tortfeasors, and, if so, no statutory provision was needed.

390. The enactment, however, as to contribution between defendants, which follows that which provides for indemnity, is intelligible, and does introduce a salutary innovation. Sub-sect. (4) of sect. 84 of the Act of 1908, which reproduces sect. 5 of the Act of 1890, with the clause appended by sect. 33 of the Companies Act, 1907 (7 Edw. 7, c. 50), is as follows: "Every person who by reason of his being a director, or named as a director or as having agreed to become a director, or of his having authorized the issue of the prospectus, becomes liable to make any payment under this section may recover contribution as in cases of contract, from any other person who,

(*r*) See *Greenwood v. Humber & Co. (Portugal), Ltd.*, [1898] W. N. 162, *per* ROMER, J., who refused to give leave to add the trustee in bankruptcy of H., a director, on the ground that, if the claim could be continued at all, as against the estate, it must be in bankruptcy: but he declined to decide whether it could be so continued or not. As to the position of such claim in the case of insolvency, where damages are sought at common law, see Ch. X. Sect. 5, Sub-s. (2), *ante*.

(*s*) See §§ 359-364, *ante*.

if sued separately, would have been liable to make the same payment, unless the person who has become so liable was, and that other person was not, guilty of fraudulent misrepresentation." This provision confers on, and against, the persons respectively indicated in the section, a right of contribution which, as between other tortfeasors, is not recognized by the common law (*t*). The persons entitled to the statutory contribution are all the four classes of persons who are liable to the statutory proceedings (*u*), except the class of promoter, which is carefully excluded. The persons who may be called upon to make the contribution are persons belonging to any one of these four classes, without exception, since all such persons, "if sued separately, would have been liable to make the same payment." It follows that the "promoter," in the statutory sense already explained (*x*), is liable to the burden, but not entitled to the benefit, of the enactment. It will be observed that the expression used in this Sub-section is "becomes liable," not, as in the preceding Sub-section, "made liable." Consequently, in order to entitle a person to contribution, it is not necessary that he should first be sued; it would be enough if an action were being contemplated to which he is conscious, or advised, that he has no defence (*y*). Nor does it signify whether the action brought against him, if and when it is brought, is for compensation under the statute or solely for damages at common law, for the greater includes the less, and if he is liable for fraudulent misrepresentation, *a fortiori* he has "become liable" for the statutory "untrue statement," without possibility of establishing the statutory innocence required to exculpate him (*z*). If and when such action is brought, the defendant, "as in cases of contract," may resort to the third party procedure (*a*). His statutory right is to the same measure of relief as would be given him if the liability in respect of which he claims contribution had arisen out of contract, and not out of a statutory tort; that is to say, he is entitled, on payment of the whole amount of the joint liability to the shareholder, or any part thereof which is in excess of his share, to recover the difference from the persons liable to make the same payment who have paid nothing, or less than their respective shares, and, even before payment of the principal liability or any part thereof, it would seem that he may obtain a prospective order to indemnity as above (*b*). Where any of the persons liable to contribute is insolvent, the aliquot share to be contributed by each of the

(*t*) See Ch. VIII, Sect. 1, Sub-s. (6), *ante*.

(*u*) See §§ 359-364, *ante*.

(*x*) Sc. who was a party to the preparation of the prospectus, or the portion of it which contained the untrue statement: see §§ 365-371, *ante*.

(*y*) As in *Shepherd v. Bray*, [1906] 2 Ch. 235, where the plaintiff had made voluntary payments to a number of shareholders. Of course, in such cases, the plaintiff must establish his legal liability to the shareholder so paid, and, even when his liability to one of them has been ascertained by judgment, he must, if challenged, prove independently that he was liable to the others whom he has paid without waiting for judgment, or for an action: *per* WARRINGTON, J., at pp. 247-250.

(*z*) *Gerson v. Simpson*, [1903] 2 K. B. 197, C. A.

(*a*) As was done in *Gerson v. Simpson*, *sup*.

(*b*) As in *Wolmershausen v. Gullick*, [1893] 2 Ch. 514 (WRIGHT, J.).

others is proportionately increased (c). The "payment" in respect of which contribution must be made would clearly include a payment of a sum by way of compromise of an action or claim, if the compromise is reasonable, as well as payment of a sum found due on trial; it would also include payment of costs, taxed or agreed, to any shareholder instituting or threatening proceedings, but only if, and in so far as, it was reasonable to resist such proceedings (d). In a recent case (e), a question arose as to whether, on the assumption that the executors of a deceased director would *not* be liable to the shareholder under the statute, contribution could nevertheless be obtained from them by a person who has become so liable. It was held by WARRINGTON, J., in the affirmative, because of the words "as in cases of contract" (f). But it is submitted that this view is erroneous; no contribution is enforceable by virtue of the enactment against any person other than one who, if sued separately, would be "liable to make the same payment," and, on the hypothesis mentioned, no executor can become so liable. The only application of the words "as in cases of contract" is to a case where this principal liability is proved or conceded, when, of course, the contribution could be enforced against the executors of any person *so liable*. The expression could never have been intended to give rights against any person not so liable (g). Where the person claiming contribution was, and the person against whom the claim is made, was not, guilty of fraudulent misrepresentation, the sub-section, in the concluding sentence (which is a repetition of sect. 33 of the Act of 1907), makes an obviously just exception to the rule contained in the earlier part. It would seem, however, that the burden of proving the two conditions of the immunity is on the person claiming the benefit of it (h).

SECT. 2. STATUTORY PROVISIONS AS TO IMPLIED MISREPRESENTATIONS ON SALES BY AUCTION.

391. From the earliest times the secret employment of "puffers" at auction sales, and other tricks and devices of the auction room, were regarded with the utmost disfavour not only by equity, but also by law. Indeed, contrary to the tendency observable in other departments, common law judges,

(c) As it was in *Shepherd v. Bray*, *sup.*, where two out of the fourteen persons "liable to make the same payment" were insolvent, which left each of the others liable to contribute one-twelfth. See also *Wolmershausen v. Gullick*, *sup.*

(d) See *Shepherd v. Bray*, *sup.*, for an illustration of the principles on which contribution to costs incurred by the plaintiffs is enforceable. It would seem that WARRINGTON, J., was somewhat generous in his application of these principles to the circumstances of that case.

(e) *Shepherd v. Bray*, *sup.*

(f) *Ibid.*, at pp. 253, 254.

(g) This may have been one of the points as to which, when *Shepherd v. Bray* came before the C. A., [1907] 2 Ch. 571, and, after some argument, was settled, that court announced that "it must not be assumed that the members of the court, as at present advised, having heard the argument for the appellants, and a good deal of the respondents' in reply, are prepared to assent to all that WARRINGTON, J., has decided."

(h) This is to be inferred from the word "unless" coming after the statement of the rule, and before the exception.

taking their cue from Lord MANSFIELD, as he took his from the Roman law (*i*), have been rather more rigorous and unbending in this respect than Courts of Chancery. The hiring by a vendor of bidders to force up the price of the property offered for sale, without notification of the fact to the purchasing public, may, no doubt, be regraded as fraudulent concealment of that which it is the duty of the vendor to disclose (*k*), or as a breach of an implied contract with the public (*l*); but it may be, and has judicially been, also considered as a case of fraudulent, though implied, misrepresentation (*m*); and it is in this respect that the topic, on principles already discussed (*n*), falls within the scope of any work on misrepresentation. After a series of decisions which settled the main principles on which any contract of sale by auction, tainted by this objectionable practice, should be dealt with, but which disclosed a slight divergence between law and equity in the application of such principles to sales of land, the legislature intervened in 1867 for the purpose of removing these doubts and conflicts, and, again, in 1893, for the purpose of declaring (in a codifying statute relating to the sale of goods in general) and giving statutory effect to the rules which had for a long time prevailed at common law with reference to the sale of goods by auction. It will be convenient to discuss, first the state of the non-statutory law existing at the time of the passing of the earlier statute of 1867, and, afterwards, the precise terms of that statute and of the enactment of 1893.

(*i*) For the principles of the Roman law on this topic, stated in their most forcible form by Cicero in a passage frequently cited in our courts, see App. C, Sect. 2, Sub-s. (2). The Scottish law has always followed the Roman law; see App. D, Sect. 4. As to how far the courts have reflected, or have transcended, the principles of current morality at various times, see App. B, Sect. 2.

(*k*) See, generally, the cases cited in notes (*r*), (*s*), and (*t*), *inf*.

(*l*) *Robinson v. Wall* (1847), 2 Ph. 372; 78 R. R. 119 (*per* Lord LANGDALE, M.R., at pp. 374, 375, who there states the question for the court as being "whether the course pursued by the vendor is, or is not, in violation of the contract which he enters into with the public," though he afterwards goes on to speak of it as a question of "good faith" or "bad faith"); and *Warlow v. Harrison* (1858), 1 E. & E. 309, Exch. Ch.

(*m*) Thus, at p. 207 of *Green v. Baverstock* (1863), 14 C. B. (N. S.) 204, WILLES, J., observes that "the person so employed is employed for the purpose of *falsely representing* that he is willing to give for the article a price which he never intended to give." So, at p. 15 of *Mortimer v. Bell* (1865), 1 Ch. App. 10, Lord CRANWORTH described the transaction proved in that case in the following forcible terms: "When the auctioneer took on himself to make an advance of £100 on Webb's bidding, he must be considered as having *said*, Mr. Webb has bid £2500, but A. B. has bid £2600, and so on, through all the eleven biddings, up to £3600. The whole proceeding was a *fiction*, calculated, if not intended, to *deceive* persons who thought of becoming purchasers. It was a *false statement* that up to £3600, or at all events up to £3500, there was a real bidder. I can find neither principle nor authority for holding that in such a case a vendor who, *by this misrepresentation*, has induced a third person to bid, can enforce his contract." Again, in *Parfit v. Jepson* (1877), 46 L. J. (C. P.) 529, GROVE, J., at p. 532, points out that "one of the objects of puffing at a sale is to *induce the outsiders to suppose* that a competition for the purchase is going on, and to increase the price which may be obtained for the property by the excitement of such *supposed* competition," and to the same effect LINDLEY, J., at p. 533; the meaning of these observations being obviously that, by the proceedings in question, the vendor makes an implied representation to possible purchasers that there is a genuine competition, with real biddings, analogous to the implied representations made by the process of "rigging the market," as to which see § 58 in Ch. III, Sect. 2, *ante*.

(*n*) See Ch. III, Sect. 2, *ante*.

Sub-sect. (1). The Law as to the Employment of Puffers at Sales by Auction existing at the time of the passing of the Act of 1867.

392. With the exception to be mentioned presently (o), it was always held by all courts from at least the year 1776, and probably from a much earlier time (p), if reports were forthcoming, that where, in the case of a sale of property of any description by auction, it is announced that the sale is to be "without reserve," or simply that the property will be sold "to the highest bidder," or where nothing is said to indicate any departure from the ordinary practice, the vendor is thereby representing to the public, by the use of those words, in the one case, and by his mere acts and conduct in the other, that there is no person employed by him to bid, and that the highest *real* bidder is to be entitled to the property; and, if in fact a "puffer" be so employed by the vendor—not by a third person unconnected with him (q)—the representation is false and fraudulent, or at all events false, and such as to entitle the purchaser to whom, after fictitious biddings by the puffer, the property is knocked down at a price inflated and enhanced thereby, to be relieved of his bargain, whether by way of defence to an action on the contract (r) or for damages for breach of it (s), or in any other form of proceeding to have the contract declared, or treated as, invalid (t).

(o) See § 393, *inf.*

(p) See App. B, Sect. 2, *post*.

(q) *Union Bank v. Munster* (1887), 37 C. D. 51. The consequences, however, of the officious intrusion of the unauthorized third party, though with the most honourable motives, may be disastrous to *himself*, though not affecting the parties to the sale, for the property may be knocked down to him, and he may be declared the purchaser, and, though he never intended to buy, he will be precluded from saying so. This was what happened to the well-meant intervention of the unfortunate solicitor in *Nelthorpe v. Pennyman* (1808), 14 Ves. 517.

(r) On this ground the defence succeeded in the following equity suits by the vendor for specific performance of contracts for the sale of real property: *Twining v. Morrice* (1788), 2 Brown C. C. 326; *Meadows v. Turner* (1820), 5 Madd. 34 (*per* LEACH, V.-C., at p. 37: "the plain meaning of the words 'without reserve' in a particular of sale is that no person will be employed to bid on behalf of the vendor for the purpose of keeping up the price. Here a person has been employed on behalf of the vendor to keep up the price, and the vendor can have no claim to the aid of a court of equity to enforce a contract against the defendant into which he may have been drawn by the vendor's want of faith"); *Robinson v. Wall*, *sup.*; and *Mortimer v. Bell* (1865), 1 Ch. App. 10 (*per* Lord CRANWORTH, L.C.). In *Crowder v. Austin* (1826), 3 Bing. 368, the plaintiff, in a common law action for the price of a horse, was held to have been properly non-suited at the trial, on proof of the employment of a puffer, without any notice of any reserved price, or of the intention of the vendor to employ a person to bid for him.

(s) In *Howard v. Castle* (1796), 6 Term. Rep. 642, which was an action in the K. B. for damages for breach of a contract to purchase a leasehold estate, Lord KENYON, C.J., and ASHURST and GROSE, JJ., gave judgment for the defendant on the ground of the secret employment of a puffer; and a similar decision was given, on similar grounds, in *Green v. Baverstock* (1863), 14 C. B. (N. S.) 204, by the Court of Common Pleas (ERLE, C.J., and WILLES, BYLES, and KEATING, JJ.), in an action for damages for non-acceptance of goods sold by auction. In this case it was held that it did not signify that the vendor had not announced that the sale was "without reserve," and that it was his duty, in order to protect himself by observing good faith, to expressly state that it was *not* "without reserve," and that in the absence of any such declaration, the usual expression "to the highest bidder" meant "to the highest *bonâ fide* bidder" (*per* BYLES and WILLES, JJ., at p. 207).

(t) The point was indirectly but effectually raised in the following cases, where it was held that the secret employment by the vendor of a person to bid on his behalf

Of course, if there is one condition announcing that the sale is to be "without reserve," followed by another condition which flatly contradicts it by declaring that the parties may bid, there can be no secrecy and no deception, and the purchaser cannot escape from his bargain (u).

393. With respect, however, to sales of land, and of land only, courts of equity, at all events where the sale was under the direction of the court, conceived it to be their duty, as guardians (so to speak) of the interests of all parties in the cause or matter, to see that the most was made of the property, and accordingly held that, where there was no express representation that the property should be sold "without reserve," or "to the highest bidder," one puffer might legitimately be employed "for the defensive purposes of protection against a sale at an undervalue" (x); though why,

was improper, and vitiated the entire contract or transaction: *Bexwell v. Christie* (1776), Cowp. 395 (the earliest reported case on the subject, where the plaintiff sued the auctioneer in the K. B. for negligently selling his gelding for less than £15, the agreed lowest price; at the trial, there was a verdict for the plaintiff, subject to the opinion of the court whether the auctioneer was bound to bid £15 for the horse, if no one else bid as much, for, if he was not so bound, there was no negligence. Lord MANSFIELD, C.J., and WILLES and ASHURST, JJ., held that he was under so such duty, but, on the contrary, he was under a duty not to do so, for this procedure, to "secretly and privately enhance the price," was "a fraud upon the sale, and upon the public," and it was no answer to say that the practice was a customary one, and rapidly acquiring notoriety, and that "tricks and practices of this kind daily increase, and grow so frequent that good men give in to the ways of the bad and dishonest in their own defence," for this was all the more reason, and not the less, why the court should restrain them with a firm hand (*per* Lord MANSFIELD, C.J., at pp. 396, 397); *Thornett v. Haines* (1846), 15 M. & W. 367 (where the purchaser of leasehold premises sold by auction "without reserve" successfully sued in the Court of Exchequer to recover his deposit, on the ground of the secret employment of a puffer, and the court said they were for following the rulings of three Chief Justices, Lord MANSFIELD, Lord KENYON, and Lord TENTERDEN: *per* POLLOCK, C.B., at p. 371); and *Warlow v. Harrison* (1858), 1 E. & E. 309, Exch. Ch. (where the defendant, on behalf of the owner, Henderson, advertised the sale of a mare "without reserve," and under conditions whereby "the highest bidder was to be the purchaser": he first bid up to sixty guineas, whereupon Henderson bid up to sixty-one, and the defendant declared the latter the purchaser: the plaintiff, having just discovered that Henderson was the owner, refused to bid more, and claimed to be the highest *bonâ fide* purchaser at sixty guineas, tendered that sum, and claimed delivery of the mare, which was refused; thereupon, instead of suing Henderson, he foolishly sued the auctioneer for damages, which the Court of K. B. was compelled to say was a misconceived proceeding; but the Exchequer Chamber felt themselves at liberty to give judgment in accordance with the real merits, and, whilst agreeing that the pleadings were technically wrong, held that the plaintiff, if he elected to amend by averring a breach of the defendant's contract with, or duty to, the public to sell without reserve to the highest *bonâ fide* bidder, was entitled to judgment, the duty of the auctioneer being to refuse to take Henderson's bid, if he knew, as he probably did, that he was the owner).

(u) *Dimmock v. Hallett* (1866), 2 Ch. App. 21. For another illustration of the absence of inducement and therefore of deception, see *Woodward v. Miller*, *inf.*

(x) *Smith v. Clarke* (1806), 12 Ves. 477. Here nothing was said about "without reserve" or "the highest bidder," and GRANT, M.R., thought, contrary to the common law view, that there was, on this ground, no fraud, besides resting his judgment on the theory stated in the text. So also the purchaser was not relieved of his bargain in *Conolly v. Parsons* (1797), 3 Ves. 625 n. (where Lord ELDON, L.C., discussed the high philosophical doctrines of the Stoics, which, *viâ* Cicero, had influenced Lord MANSFIELD, and also laid some stress on what Lord MANSFIELD—see note (t), *sup.*—refused to recognize as having any bearing on the question, *viz.* the growing notoriety of the impugned practice), nor in *Bramley v. Alt* (1798), 3 Ves. 619 (where, whilst approving Lord MANSFIELD's principles, Lord ELDON, L.C., said that they had no application

if such a manoeuvre is calculated to deceive, the court should be any more entitled to countenance it than the individual to practise it, or why the court should permit either itself or the party to be a little dishonest with one puffer, but not very dishonest with two, it is difficult to understand (y). This exception was not recognized by courts of law in respect of sales of interests in land (z); and, as regards sales of goods, courts of equity are not reported to have dealt with these, at all events in such a manner as to raise the question under discussion, and, therefore, there has not been established any express equitable exception which the courts of common law were called upon to declare their dissent from; but, if there had been, it is clear that such dissent would have been declared by them, for it is already implied in their decisions (a).

Sub-sect. (2). The Statute of 1867 and the Enactment of 1893.

394. By the year 1867 it had become apparent that there was *some* conflict between the practice of courts of law and courts of equity as to the employment of puffers in sales of real property by auction, though it was not quite certain what the exact nature of that conflict was. In 1848 it had been stated by the Court of Exchequer that the only difference between the two was that where a court of equity would allow one puffer, a court of law would allow none (b). In 1863, WILLES, J., expressed the opinion that the equitable doctrine was confined to sales under the direction of the court (c). Finally in 1865, when delivering judgment in the case which is said to have given rise to the passing of the statute of 1867, Lord CRANWORTH, L.C., after reviewing the previous authorities, came to the conclusion that the rule of law was that any bidding by or on behalf of the vendor, in the absence of an express reservation stipulation or notice

to a case where real bidding had intervened between the initiation of the sham bidding by the puffer and the fall of the hammer—a view which was not accepted in *Parfill v. Jepson*, *sup.*, or in *Woodward v. Miller* (1845), 15 L. J. (CH.) 6, 2 Coll. 279 (where there was only one bidder for the vendor, and the purchaser did not prove, or even allege, that he was misled, or that he knew that the puffer was bidding, and KNIGHT-BRUCE, V.-C., but not till he had offered an issue to the defendant, which was refused, granted the vendor specific performance), or, lastly, in *Flint v. Woodin* (1852), 9 Hare, 618 (where it was held that the mere fact of a puffer being employed does not, *per se*, indicate fraud).

(y) The much sounder view entertained at a later date was that, in respect of sales through its own officers, the court should be doubly careful to see to the absolute fairness of the transaction: see Ch. XI, Sect. 3, Sub-s. (5), *ante*. The theory stated in the text of trusteeship for the interests of the parties in the particular cause or matter in which the sale is ordered betrays an almost cynical disregard of the principle that Equity is a trustee for *all* persons interested in the execution of any of her decrees, and certainly not least for a third person who, after having been induced to contract by misrepresentation, and then being told that fairness to the parties under her immediate protection forbids any favourable consideration of his grievance, may well exclaim: “If she be not fair to me, What care I how fair she be?”

(z) See *Howard v. Castle*, *sup.*, and *Thornett v. Haines*, *sup.*

(a) See *Bexwell v. Christie*, *Crowder v. Austin*, *Warlow v. Harrison*, and *Green v. Baverstock*, *sup.*

(b) *Thornett v. Haines* (1846), 15 M. & W. 367, *per* POLLOCK, C.B., at p. 371, and PARKE, B., at pp. 371, 372.

(c) *Green v. Baverstock* (1863), 14 C. B. (N. S.) 204, at p. 206.

to that effect, was in law no bidding at all, whilst the rule of equity was that the vendor might fix a reserve price, and that, if he did so, though without notice or stipulation, one person, but only one, might be employed as a puffer (*d*).

395. To remedy this unsatisfactory state of things, Lord ST. LEONARDS introduced the Sale of Land by Auction Act, 1867 (30 & 31 Vict. c. 48), which is sometimes referred to under the nickname of the Puffers' Act, and is confined strictly to sales of land; "land" being interpreted as including "any interest in land" by sect. 3, which also defines "puffer" as "a person appointed to bid on the part of the owner," and "agent" as a "solicitor, steward, or land agent of the seller." Sect. 4, after reciting that "there is at present a conflict between Her Majesty's courts of law and equity, in respect of the validity of sales by auction of land where a puffer has bid although no right of bidding on behalf of the owner was reserved, the courts of law holding that all such sales are absolutely illegal, and the courts of equity under some circumstances giving effect to them, but even in courts of equity the rule is unsettled," and that "it is expedient that an end should be put to such conflicting and unsettled opinions," proceeds to enact "that, from and after the passing of this Act, whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law." Sect. 5 also has a preamble of its own, to the effect that "as sales of land by auction are now conducted, many of such sales are illegal, and could not be enforced against an unwilling purchaser, and it is expedient for the safety of both seller and purchaser that such sales should be so conducted as to be binding on both parties," and, after this preamble, the section provides that "the particulars or conditions of sale by auction of any land shall state whether such land will be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved; and, if it is stated that such land will be sold without reserve, or to that effect, then it shall not be lawful for the seller to employ any person to bid at such sale, or for the auctioneer to take knowingly any bidding from any such person." On the other hand, sect. 6 enacts that "where any sale by auction of land is declared either in the particulars or conditions to be subject to a right for the seller to bid, it shall be lawful for the seller, or any one person on his behalf to bid at such auction in such manner as he may think proper." The two last-cited sections, prohibitory and permissive respectively, do not cohere very well, but it has been decided that the vendor must bring himself strictly within the permissive section, if the sale is to be valid, and that it will not avail him to show merely that he is outside the prohibitive enactment (*e*); also

(*d*) *Mortimer v. Bell* (1865), 1 Ch. App. 10, at pp. 13, 14. Here, whilst recognizing the settled practice of courts of equity, Lord CRANWORTH, L.C., did not disguise his disapproval of that practice, but decided in favour of the purchaser on the ground that there the equitable rule had been infringed, since there were two puffers in that case, the auctioneer and his agent, Webb.

(*e*) *Gilliat v. Gilliat* (1869), L. R. 9 Eq. 60, where the sale was stated to be "subject to a reserved bidding which has been fixed by the judge," which expression, having

that where the "right for the seller to bid," to which the sale is declared to be "subject," is defined and limited by the particulars or conditions, within the meaning of sect. 6, the seller acquires no right under that section to employ a person to bid otherwise than in accordance with the declared limits and qualifications (*f*). Sect. 7 relates to "the practice of opening the biddings on any sale by auction of land under or by virtue of any order of the High Court of Chancery" (now the Chancery Division of the High Court of Justice), and enacts that such practice "shall be discontinued, and the highest *bonâ fide* bidder at such sale, provided he shall have bid a sum equal to, or higher than, the reserved price (if any), shall be declared and allowed the purchaser, unless the court or a judge shall, on the ground of fraud or improper conduct in the management of the sale"—which means conduct in the nature of, or bordering upon, fraud (*g*)—"upon the application of any person interested in the land (such application to be made to the court or judge before the chief clerk's certificate of the result of the sale shall have become binding), either open the biddings, holding such bidder bound by his bidding, or discharge him from being the purchaser, and order the land to be resold upon such terms as to costs and otherwise as the court or judge shall think fit." Sect. 8 is a wholly unnecessary saving clause providing that, except as stated, sales by direction of a court of equity shall not be affected; and sect. 9 enacts that the statute shall not extend to Scotland, the reason being that Scots law had always followed the rigour of the Roman law as to auction sales, and no conflict between law and equity had arisen, or ever could arise, because in Scotland no such distinction has ever been made (*h*). On the whole, the statute (as one might expect from Lord St. LEONARDS) has proved both useful in substance, and lucid in expression, and has required very little judicial interpretation (*i*).

396. There has never been any question about the rules relating to sales of goods by auction where secret "puffing" is resorted to, nor any difference between law and equity in this matter, because equity has not busied itself with auction sales of any property except land and interests

regard to the word "fixed," clearly meant no more than "a reserved price": so that the vendor did not come within the prohibition in sect. 5, but, inasmuch as the conditions and particulars of sale nowhere stated that the sale was to be "subject to a right for the seller to bid," he did not bring himself within the permissive provisions of sect. 6. Accordingly, on proof of an employment of a puffer, Lord ROMILEY, M.R., relieved the purchaser of his bargain.

(*f*) This was the case in *Parfitt v. Jepson* (1877), 46 L. J. (C. P.) 529, where the conditions declared that "a right was reserved to the vendor to bid once by himself or his agent," and it was proved that he had bid more than once, and therefore was not protected by sect. 6, and on this ground, amongst others, his action for damages for breach of the contract of sale was defeated (*per* LINDLEY, J., at pp. 533, 534).

(*g*) *Delves v. Delves* (1875), L. R. 20 Eq. 77, *per* MALINS, V.-C., who dismissed the purchaser's application under sect. 7, on the ground that he had proved neither "fraud"—indeed, he had expressly declined even to allege this—nor "improper conduct," in the sense (stated in the text) which the V.-C. assigned to that term.

(*h*) See App. D, *post*.

(*i*) The three cases cited in notes (*e*), (*f*), and (*g*), *sup.*, seem to be the only reported authorities on the statute.

in land. Consequently no amending statute or enactment, corresponding to that of 1867 in respect to land, was required with respect to goods. But when the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), for the purpose of codifying the law, both English and Scottish, relating to the sale of goods generally, was passed, it became necessary to state, amongst other rules, the rules relating to this particular form of a sale. These are set out in sect. 58, sub-sects. (3) and (4) of which deal with the "puffer" question as follows: "(3) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person: Any sale contravening this rule may be treated as fraudulent by the buyer: (4) A sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller. Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction." These rules are expressed with admirable clearness; they represent accurately the judicially declared law on the subject both in England (*k*) and in Scotland (*l*); and, by the simple and succinct provision that the buyer may treat a sale which contravenes the rule as fraudulent (*m*), the necessity for cumbrous and detailed enumeration of remedies is avoided. The enactment has up to the present raised no problems or difficulties for solution by the courts; nor is it likely to do so in the future.

SECT. 3. OTHER STATUTORY PROVISIONS RELATING TO MISREPRESENTATION.

397. Apart from the statutes and enactments referred to in the foregoing Sections of this Chapter, or (at their appropriate places) mentioned, or hereafter to be mentioned, in other Chapters (*n*), and such statutory

(*k*) See the cases cited in note (*a*), *sup*.

(*l*) Which has always been the same as in England so far as substance is concerned: though the terminology occasionally differs: this is recognized in sub-s. (4), where the Scotch term "upset" is added to the English "reserved," as applied to the price.

(*m*) That is to say, the purchaser, under this comprehensive formula, becomes entitled to all the relief and remedies (whether alternative, or cumulative) to which a representee is entitled in any case of fraudulent misrepresentation, as to which (for a summary) see Ch. IX, Sect. 1, *ante*, and (for the details) Chs. X, XI, and XII, *ante*.

(*n*) These may be classified as follows: (1) enactments declaring or codifying the common law, such as sect. 20 of the Marine Insurance Act, 1906, referred to in Ch. II, *ante*, and elsewhere, and sect. 23 of the Sale of Goods Act, 1893; (2) enactments not specifically relating to misrepresentation, but prescribing or authorizing a special procedure for rectifying, or varying, or expunging entries from, registers and other statutory documents, or the avoidance of contracts on the ground of misrepresentation, amongst others, such as the enactments relating to the rectification of the registers of companies, and the variation of lists of contributories, and other provisions of the Companies Acts, referred to in Ch. XI, Sect. 4, Sub-ss. (3), (4), (5), and (6), and the statutes relating to Patents, Designs, and Trade Marks, and the Vendor and Purchaser Act, 1874, referred to in Ch. XIV, Sect. 1, Sub-s. (5), and in Ch. XV, Sect. 2, Sub-s. (2), *post*, respectively; and (3) enactments varying, or adding to, the principles of the common law, such as Lord Tenterden's Act, discussed in

provisions as relate to non-disclosure, pure and simple, that is to say to those species of non-disclosure which cannot fairly be regarded as amounting, or contributing, to misrepresentation, and which, therefore, do not come within the scope of this work (*o*), and those enactments which render misrepresentation or concealment of various kinds, and for various purposes, criminal offences or subject to penalties, without expressly attaching any civil consequences thereto (*p*), and which, again, cannot be considered as belonging to the subject of actionable misrepresentation, except in an indirect sense (*q*),—there are very few enactments which in any way affect,

Ch. X, Sect. 2, Sub-s. (4), *ante*, sect. 6 of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 7), referred to in Ch. XI, Sect. 4, Sub-s. (1), and certain provisions of the Bills of Exchange Act, 1882, noticed in Ch. XII, Sect. 3, *ante*.

(*o*) Such as sects. 18, 19 of the Marine Insurance Act, 1906, the misfeasance provisions of the Companies (Consolidation) Act, 1908, s. 215, reproducing the like provisions of the Companies Act, 1862, and the Companies (Winding Up) Act, 1890,—as to which see Lord Halsbury's *Laws of England*, title "Companies," vol. v, pp. 478–486,—and the provisions as to disclosure of contracts and other matters in prospectuses which are contained in sect. 81 of the Act of 1908, reproducing, with many important additions, those of sect. 38 of the Act of 1867, which section was repealed by the Companies Act, 1900, s. 33 (1), and Schedule. Many, however,—indeed most,—of these cases of statutory non-disclosure involve implied statutory misrepresentation also, and, as such, fixed a place in the notes to Sect. 1 of this Chapter, *ante*.

(*p*) Such as the provisions of the Larceny Act, 1861 relating to false pretences, set out under that heading at p. 325 of vol. ii of the Law Reports, Chronological Table and Index of the Statutes (13th Edition); the enactments relating to cheating and like offences set out under the head of "Fraud" at pp. 326, 327, and to "personation," at pp. 327, 328 of the same volume: the various offences against company law (mainly non-disclosure) tabulated in Lord Halsbury's *Laws of England*, title "Companies," vol. v, pp. 314–317; the statutes 13 Eliz. c. 5, and the Debtor's Act, 1869, ss. 11–14, as to frauds upon creditors; the statute 27 Eliz. c. 24, as to frauds upon purchasers; the Servants' Characters Act, 1792 (32 Geo. 3, c. 56), and the False Characters Act, 1906, s. 2, as to false statement of person's character or employment; the various criminal enactments as to food and drugs, and particularly as to misrepresentation of the nature of the article demanded—see Lord Halsbury's *Laws of England*, title "Food and Drugs," vol. xv, pp. 16 *et seq.*; the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), ss. 25–27, as to the use in trade of "false and unjust" weights, measures, scales, etc.; the statute 7 & 8 Vict. c. 24, s. 4, as to the offence of spreading false rumours with the intent to enhance or decry the price of any goods or merchandise; the Pensions Act, 1839 (2 & 3 Vict. c. 51), the Pensions and Yeomanry Pay Act, 1844 (47 & 48 Vict. c. 55), and the Police Act, 1890 (53 & 54 Vict. c. 55), s. 9, as to false representations, statements, and certificates, and the feigning of disease or infirmity, for the purpose of obtaining pensions, etc.; the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 12, as to misrepresentations in any return or entry therein prescribed; the Merchant Shipping Act, 1894, ss. 227, 353, 354; the False Alarm of Fire Act, 1895; the Moneylenders Act, 1900, s. 4, as to false representations inducing persons to borrow money; the Prevention of Corruption Act, 1906, s. 1, as to the use by an agent of documents containing false statements with intent to deceive his principal; and a number of enactments with reference to giving of false information, and the making of false representations and declarations, to various registrars, for the purpose of obtaining certificates, licences, registrations, and the like, which are set out in the Table and Index above cited, at vol. ii, p. 319.

(*q*) That is, in the sense that every violation of a statutory prohibition is the subject of an action for damages or an injunction at the suit of any person injured in the particular manner contemplated by the legislature, unless it appears from the general tenor of the statute that it was not intended that the public should have a civil remedy, or should have a civil remedy by action. See *Couch v. Steel* (1853), 3 E. & B. 402; *Gorrie v. Scott* (1874), L. R. 9 Exch. 125; *Ross v. Rugge-Price* (1876), 1 Ex. D. 269; *Atkinson v. Newcastle and Gateshead Waterworks Co.* (1877), 2 Ex. D. 441, C. A.; *Cowley v. Newmarket Local Board*, [1892] A. C. 345, H. L.; and *Stevenson v. Chown*, [1901] 1 Ch. 894.

by way of declaration, or amendment, the common law principles of misrepresentation as a branch of the civil law, or which accordingly require to be noticed in this place. Of these, there are three of general, and two of partial and local application.

398. The first three enactments referred to are, in order of date, as follows: sect. 15 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), whereby it is provided that "where a debtor makes any arrangement or composition with his creditors . . . he shall remain liable for the unpaid balance of any debt which he incurred or increased, or whereof before the date of the arrangement or composition he obtained forbearance, by any fraud, provided the defrauded creditor has not assented to the arrangement or composition otherwise than by proving his debt and accepting dividends" (*r*); sect. 25 of the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), whereby it is (*inter alia*) enacted that "any contract, bargain, sale, or dealing made by" means of "any weight, measure, scale, balance, steelyard, or weighing machine which is false or unjust" is to be "void" (*s*); and sect. 41 of the Partnership Act, 1890 (53 & 54 Vict. c. 39), which provides that "where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescission is, without prejudice to any other right, entitled to a lien on, or right of retention of, the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of a share in the partnership, and for any capital contributed by him, and is to stand in the place of the creditor of the firm for any payments made by him in respect of the partnership liabilities, and to be indemnified by the person guilty of the fraud, or making the misrepresentation, against all the debts and liabilities of the firm" (*t*).

399. The two local and partial enactments above mentioned are sect. 35 of the Stannaries Act, 1869 (32 & 33 Vict. c. 19), whereby, in the case of companies within the Stannaries, "a transfer of shares made for the purpose of getting rid of the further liability of a shareholder, as such, for a nominal or no consideration, or to a person without any apparent pecuniary ability to pay the reasonable expenses of working a mine, or a person in the menial or domestic service of the transferor, shall be presumed to be a fraudulent transfer, and need not be recognized by the company, or by the court in the winding up of the company, whether the company be a registered or an unregistered company" (*u*); and sect. 19 of the Indian Contract Act,

(*r*) As to what is "assenting otherwise" than as stated, see *Thorp v. Dukin* (1885), 52 L. T. 856, Div. Ct.

(*s*) Not voidable merely, as would be the result of the implied misrepresentation at common law: see Ch. XI, Sect. 1, Sub-s. (4).

(*t*) This declares the main, but not the only, common law rights of the representee in such cases. As to the others, which are saved by the words "without prejudice to any other right," see Lindley's *Partnership*, Book III, Ch. X, Sect. 5, Sub-s. (3).

(*u*) As to the Stannaries Jurisdiction, see Ch. XV, Sect. 1. At common law, the company would have to establish by evidence, first, that a statement of the consideration for the transfer, or as to the position in life of the transferee, was made to the directors, and, secondly, that it was false: see Ch. XI, Sect. 3, Sub-s. (3). By the

which makes it a defence to any action or proceeding to set aside a contract on the ground of misrepresentation, that the representee had the means of discovering the truth with reasonable diligence (x).

enactment, the mere doing of the acts described is to raise an irrebuttable implication of a representation, and also an equally irrebuttable presumption that it was not only false, but fraudulent. As to the atrocious hardship and injustice of this statutory presumption of fraud, see § 459 in App. A, Sect. 4, *post*. Though the representor is forbidden to controvert the above implication and presumption, the statute does not affect any of the affirmative defences mentioned in Ch. XI, Sect. 4, which even a fraudulent representor can set up: see *Re Wheat Unity Wood Mining Co., Chynoweth's Case* (1880), 15 C. D. 13, C. A.

(x) This is a departure from the non-statutory rule: see Ch. X, Sect. 2, Sub-s. (1). A defence under this provision was set up in *Mahomed Kala Mea v. A. V. Harperink* (1908), 25 T. L. R. 180, P. C., but the representor did not bring himself within its terms.

CHAPTER XIV.

MISREPRESENTATION AS A GROUND OF REMEDY OR RELIEF
AT THE INSTANCE OF PERSONS OTHER THAN REPRESENTEEES.

400. THERE are a variety of cases of misrepresentation which give rise to civil rights, liabilities, and consequences, though not falling within the definition of actionable misrepresentation adopted for the purposes, and as the foundation, of this Commentary (*a*) and of the Code which precedes it (*b*). These may be divided into two main classes (*c*), first, the class of misrepresentation which, though not made to the party entitled to relief, is made in such a way as to injure him, and, secondly, the class of misrepresentation which, though neither made to the party entitled to take advantage of it, nor so as to injure him individually, nevertheless constitutes, not a cause of action, but a defence, which such party may set up to an action of contract or tort, not out of any consideration for him, but purely on grounds of public policy. It seems desirable to devote a Chapter to the discussion of these two types of case, particularly having regard to the fact that the first of them, for a long time in the history of our jurisprudence, was regarded as belonging strictly to the subject of "deceit" in the larger and more fluid interpretation which the word then bore (*d*).

SECT. 1. REMEDIES AVAILABLE TO A PERSON INJURED BY A
MISREPRESENTATION NOT MADE TO HIM.

401. Where, by misrepresentation to a public authority, or to the public, any person obtains for himself advantages or privileges, to the prejudice of the proprietary rights or interests of a third person, whether individually or as a member of the community, that third person, though he is not the representee, and therefore could not sue in an action for misrepresentation in the modern and strict sense, is not left without remedy, but, on application to the proper court (*e*) by the proper procedure (*f*), and on compliance

(*a*) See § 8, *ante*.

(*b*) See Parts VII, VIII, and IX, of the Code.

(*c*) Which are the subject of Sects. 1 and 2 respectively of this Chapter, *inf*.

(*d*) See App. A, Sect. 1, Sub-s. (2).

(*e*) See § 404, *inf*.

(*f*) See § 406, *inf*.

with all the prerequisites as to allegation and proof (*g*), he is entitled to a judicial annulment of the instrument by which such advantages or privileges have been obtained, or to have it judicially treated as void, or to relief by way of injunction and damages for the injury done to him by the misrepresentation, as the case may be. The class of misrepresentation under consideration comprises the following species: (1) fraudulent misrepresentations to an English court of justice, whereby a judgment or order is obtained in favour of the misrepresenter; (2) the like to a foreign tribunal, with the like result; (3) the like to a domestic forum, with the like result; (4) misrepresentations whereby the Crown or a department of the State has been induced to grant to the misrepresenter charters, letters patent, licences, certificates, registrations, or other privileges; and (5) misrepresentations to the public of the kind known as "passing off."

Sub-sect. (1). English Judgments, etc., procured by Fraudulent Misrepresentation.

402. It has been undoubted law, since at least the time of Coke (*h*), that "acts of the highest judicial authority," though "not to be impeached from within," yet "are impeachable from without," for "although it is not permitted to show that the court was mistaken, it may be shown that they were misled. Fraud is an extrinsic collateral act; which vitiates the most solemn proceedings of courts of justice. Lord COKE says, it avoids all judicial acts, ecclesiastical or temporal" (*i*). Accordingly, either at the suit of the party against whom it was pronounced, or, where both parties colluded and conspired to deceive the court, at the suit of the Attorney-General or a stranger interested, judgments, orders, decrees, sentences, and other judicial acts of English tribunals, have been set aside or annulled, or treated as void, on proof of the requisite facts (*k*),

(*g*) See § 408, *inf*.

(*h*) And *deceptio curiæ* was punishable as a contempt of the Crown, and an injury to the party, as early as the time of King John, and was, indeed, the principal, if not the only, subject of the writ of deceit (*breve de deceptione*) in its earliest form: see App. A, Sect. 1, Sub-s. (1).

(*i*) *The Duchess of Kingston's Case* (1776), 2 Sm. L. C. (11th Edition) 731. In this case the judges were summoned by the House of Lords, and requested to answer two questions: (1) "whether a sentence of the Spiritual Court against a marriage in a suit for jactitation of marriage is conclusive evidence so as to stop the counsel for the Crown from proving the said marriage in an indictment for polygamy; and (2) whether, admitting such evidence to be conclusive upon such indictment, the counsel for the Crown may be admitted to avoid the effect of such sentence by proving the same to have been obtained by fraud or collusion." The judges unanimously answered the first question in the negative, and the second (which alone concerns the present discussion) in the affirmative.

(*k*) This was the case in *Brooke v. Mostyn* (Lord), (1865), 33 Beav. 437; *Priestman v. Thomas* (1884), 9 P. D. 210, C. A.; *Cole v. Langford*, [1898] 2 Q. B. 36, Div. Ct.; *Shurrock v. Littlejohn* (1898), 68 L. J. (Q. B.) 165, Div. Ct.; *Nixon v. Loundes*, [1909] 2 Ir. R. 1; and *White v. Ivory* (1910), *Times*, 27th April. In the nature of the case, the number of successful actions for this purpose must be few, as compared with the number of those which fail, owing to the firm recognition by the courts of the interest of the community *ut sit finis litium*, and the strict burden of proof which is accordingly required of the plaintiff,—proof not merely of the fraudulent misrepresentation, but of the fact that it could not have been discovered and

or declared, on demurrer or otherwise, to be the proper subject of such proceedings or treatment (*l*); and, in every one of those cases in which, for one reason or another (*m*), the jurisdiction was not exercised, its existence was nevertheless recognized in clear and explicit terms (*n*).

403. It does not signify what is the precise nature of the "judicial act" which is sought to be invalidated; whether a judgment, decree, or order of the ordinary kind, pronounced by a court of equity (*o*), or by a court of common law (*p*), or an adjudication or order in bankruptcy (*q*), or a sentence of an ecclesiastical or matrimonial tribunal, in respect of marriages (*r*), or a judgment of a court of probate establishing a will (*s*). Nor does it signify whether the judgment or order impugned is of a final or an interlocutory character (*t*), or was made *in invitum*, after a hearing or

exposed at the trial. In *Flower v. Lloyd*, No. 2 (1879), 10 C. D. 327, C. A., JAMES, L.J., at pp. 333, 334, delivers himself of some very strong observations, in which he says that THESIGER, L.J., concurs, by way of addendum or appendix to the joint judgment of the court, as to the inconvenience of exercising the jurisdiction.

(*l*) As, for instance, in the *Duchess of Kingston's Case*, *sup.*; *Davenport v. Stafford* (1845), 8 Beav. 503 (per Lord LANGDALE, M.R., at pp. 522, 523); *Eyre v. Smith* (1877), 2 C. P. D. 435, C. A. (unsuccessful demurrer to a reply); *Abouloff v. Oppenheimer* (1882), 10 Q. D. B. 295, C. A. (per BRETT, L.J., at p. 308, who there says that the doubts expressed by JAMES and THESIGER, LL.JJ., as to the jurisdiction—*vid. sup.*—are not well founded; and *Wyatt v. Palmer*, [1899] 2 Q. B. 106, C. A. (application to strike out statement of claim failed).

(*m*) See the authorities cited in notes (*x*), *inf.*, and others, to this Sub-section.

(*n*) See *Charter v. Trevelyan* (1844), 11 Cl. & Fin. 714 (per Lord LYNTHURST, L.C.); *Perry v. Meadowcroft* (1846), 10 Beav. 122 (per Lord LANGDALE, M.R.); *Dunn v. Cox* (1853), 11 Hare, 61 (per WOOD, V.-C.); *Patch v. Ward* (1867), 3 Ch. App. 203 (per Lord CAIRNS, L.J., at pp. 206, 207); *Motion v. Moojen* (1872), L. R. 14 Eq. 202 (per BACON, V.-C.); *Flower v. Lloyd*, No. 1 (1877), 6 C. D. 297, C. A. (per JESSEL, M.R., at pp. 299, 300, and JAMES and BAGGALLAY, LL.JJ., at p. 302); *Same v. Same*, No. 2 (1879), 10 C. D. 327, C. A. (per BAGGALLAY, L.J., at p. 334); *Boswell v. Coaks* (1894), 6 R. 167, H. L. (per Lord SELBORNE, at p. 170); *Baker v. Wadsworth* (1898), 67 L. J. (Q. B.) 301, Div. Ct.; and *Birch v. Birch*, [1902] P. 130, C. A. (per COZENS-HARDY, L.J., at p. 137).

(*o*) In the following cases judgments, decrees, and orders of a court of equity were the subject of attack: *Patch v. Ward*, *sup.*; *Motion v. Moojen*, *sup.*; *Flower v. Lloyd*, No. 1, *sup.*; *Same v. Same*, No. 2, *sup.*; and *Boswell v. Coaks*, *sup.*

(*p*) Judgments of common law courts were sought to be annulled in *Dunn v. Cox*, *Baker v. Wadsworth*, *Nixon v. Loundes*, and *White v. Ivory*, *sup.*

(*q*) *Eyre v. Smith*, *sup.*, where it was alleged by the plaintiff in his reply that certain resolutions for the liquidation of the defendant's affairs by arrangement, pleaded as a bar to the action, and the registration of these resolutions, had been procured by fraudulent misrepresentation to the creditors, and to the bankruptcy registrar, respectively.

(*r*) *Duchess of Kingston's Case*, *sup.* (sentence of ecclesiastical court in suit for jactitation of marriage); and *Perry v. Meadowcroft*, *sup.* (sentence of ecclesiastical court declaring a marriage void).

(*s*) *Birch v. Birch*, *sup.*

(*t*) See *Dalglish v. Jarvie* (1850), 2 Macn. & G. 231 (per ROLFE, B., at p. 243), and *London Assurance Co. v. Mansel* (1879), 11 C. D. 363 (per JESSEL, M.R., at p. 368). The former case was one of an interlocutory injunction, in which it was pointed out by Lord CRANWORTH (then ROLFE, B., and one of the Commissioners of the Great Seal) that an order for that purpose which has been procured, not only by misrepresentation, but by the withholding of any matter which *uberrima fides* requires to be disclosed, is ground for dissolution. In the latter case, which was one of insurance, the former is used as an illustration of the principles of good faith said to be applicable alike to all such transactions. Cp. also *Re S.*, a *Solicitor*, &c. (1910), 55 Sol. J. 127, where, on the ground that material facts were withheld from the court, an order to tax, obtained *ex parte* on a petition of course, was discharged.

contest, or merely for the purpose of sanctioning, or giving effect to, a consent of, or compromise between, the parties (*u*); nor whether the judgment or order is sought to be set aside *in toto*, or only in part, by the expunging of some entry or recital therein which was procured by the alleged misrepresentation (*x*).

404. Questions of jurisdiction, however, may arise, depending upon the nature of the "judicial act" impugned. Thus an application to set aside a bankruptcy order should be made to the judge exercising bankruptcy jurisdiction (*y*), and a claim to set aside a judgment establishing a will should be asserted in the Probate Division (*z*). Subject to such questions of exclusive jurisdiction, there seems no reason why the judgment of any court should not be invalidated by proper proceedings in any Division of the High Court (*a*).

405. The nature of the relief which, on proof of the requisite facts, may be given to the party invoking the jurisdiction of the court is twofold. Either the "judicial act" impeached will be set aside, with or without a declaration of its invalidity, at the instance of the party aggrieved (*b*); or the misrepresentation will furnish the party with a good ground of defence to any action brought against him which is founded upon the "judicial act" in question and depends for its success upon the validity thereof (*c*). It should be noted here that the court of bankruptcy has

(*u*) Thus in *Davenport v. Stafford, sup.*, it was a question whether the party had been induced to consent to the insertion of an entry in the decree or order by misrepresentation: in *Dunn v. Cox, sup.*, it was alleged that the plaintiff's consent to an order of the Court of Exchequer had been obtained by the like means: *Brooke v. Lord Mostyn, sup.*, was a case of a family compromise sanctioned by the court in chambers: *Priestman v. Thomas, sup.*, was a case of a compromise of a testamentary suit, to which the party had been induced by misrepresentation to consent, as well as to a judgment of the Probate Division, in accordance therewith, admitting a certain will to probate: in *Shurrock v. Littlejohn, sup.*, the party had been induced by fraud to consent to judgment under O. XIV, proceedings; and in *Wyatt v. Palmer, sup.*, a consent to let judgment go by default had been similarly procured. It will be noted that no reference is made in the text to the class of case in which a compromise or settlement of an action, or a consent judgment or order, is the result of mistake, or as to which there is a question of the extent of the express or implied authority of counsel or solicitor, which fall under another chapter of law altogether.

(*x*) In *Davenport v. Stafford, sup.*, Lord LANGDALE, M.R. (at pp. 522, 523), recognized the clear *prima facie* right of a party to be relieved from the consequences of an admission in a decree, the insertion of which, or the consent to the insertion of which, was procured by fraud.

(*y*) *Motion v. Moojen, sup.*, and *Boaler v. Power*, [1910] 2 K. B. 229, 232, C.A.; and see Lord Halsbury's *Laws of England*, title "Bankruptcy and Insolvency," vol. ii, p. 56, and, as to the revocation of administration orders procured by fraud, *ibid.*, pp. 299, 300, and R. 150 of the Bankruptcy (Administration Order) Rules, 1902.

(*z*) *Priestman v. Thomas, sup.*, per HANNEN, P., at p. 76 of the report of the case in the court of first instance (1884), 9 P. D. 70.

(*a*) Thus in *Dunn v. Cox, sup.*, the bill in Chancery prayed the setting aside of an order made in the Court of Exchequer, and, though the plaintiff failed, because his proof was not sufficient, the jurisdiction was not denied.

(*b*) This was the nature of the relief prayed, whether granted or not, in all the cases cited in the notes to this Sub-section, except those mentioned in the next note.

(*c*) Thus in the *Duchess of Kingston's Case*, *Perry v. Meadowcroft*, and *Eyre v. Smith, sup.*, the "judicial acts" (viz. a sentence of an ecclesiastical court in a suit for jactitation of marriage, a like sentence declaring a marriage void, and the registration of resolutions for liquidation by arrangement, respectively) stood in the way of the Attorney-General on a prosecution for bigamy, in the first case, a party claiming

peculiar powers in this respect. It may inquire into the consideration even of a judgment debt, and go behind and ignore a judgment proved to have been obtained by fraud, but it is by no means bound, and ought not, to do so except on a very strong *prima facie* case (*d*).

406. The procedure by which the claim may be asserted is by action, not by rehearing (*c*), nor by application to the court in the action in which the judgment or order was given or made (*f*), except in cases of interlocutory orders (*g*), or judgments by default (*h*), and even in these cases the jurisdiction to entertain an action still exists, though the resort to an action, when a cheaper and more convenient procedure is provided by O. 27, r. 15 of the R. S. C., may be penalized by a special order as to costs (*i*). The trial of the action is ordinarily by a judge, but there is no reason why it should not take place before a judge and jury, and in a recent case this mode of trial was resorted to (*k*). The old learning as to the precise distinction between "original" and "supplemental bills of review," with or without leave, and, indeed, the whole procedure by such bill, is now obsolete (*l*).

407. The person entitled to maintain the proceedings or set up the defence is the person against whom the decision was pronounced, or, where he was not a party to the proceedings, whose status and interests were injuriously affected thereby (*m*). In the former case, the defendant, or person against whom the relief should be sought, is the party who procured the decision; in the latter, the plaintiff must attack both parties to the cause in which it was given, for he can only succeed by establishing the collusion of both in deceiving the court (*n*).

408. The plaintiff in any proceedings to annul an English judgment or order must prove that the misrepresentation was fraudulent on the part of the party, or of both parties, as the case may be, who procured the judgment (*o*), except in the case of a judgment as to a will, when it is sufficient

property as a descendant of the marriage, in the second, and a party suing on a bill of exchange, in the third. In all three cases, the court was asked to treat the "judicial act" as of no effect, and thus to remove the impediment *prima facie* interposed, on the ground of fraudulent misrepresentation, and in each case the jurisdiction of the court to grant such relief in a proper case was judicially declared.

(*d*) See *Re Flatan* (1888), 22 Q. B. D. 83, C. A., per Lord Esher, M.R., at p. 85. FRY, L.J., at p. 86, and LOPES, L.J., at p. 87; and *Boaler v. Power*, *ubi sup.*

(*e*) *Flower v. Lloyd*, No. 1, *sup.*

(*f*) *Ibid.* In *Nixon v. Loundes*, *sup.*, however, the jurisdiction was asserted and exercised by an Irish Court.

(*g*) See note (*t*), *sup.*

(*h*) *Wyatt v. Palmer*, *sup.*

(*i*) *Ibid.*, per LINDLEY, M.R., at pp. 109, 110.

(*k*) *White v. Ivory*, *sup.*, where CHANNELL, J., remarked that this was the first case in his experience, or reported, in which the issue had been so tried, but that there was no objection in law or practice to the adoption of this course.

(*l*) *Boswell v. Coaks* (1894), 6 R. 167, H. L., per Lord SELBORNE at p. 70.

(*m*) Thus, in *Perry v. Meadowcroft* (1846), 10 Beav. 122, the plaintiff who asked the court to treat as a nullity the sentence of the ecclesiastical court pronouncing the marriage of his ancestors void was, at the time at which it was pronounced, *en ventre sa mère*.

(*n*) As in the *Duchess of Kingston's Case*, *sup.*, and *Perry v. Meadowcroft*, *sup.*

(*o*) See, generally, the cases cited in the notes to this Sub-section. Here, as in the B.M.

to prove fraud on the part of any one (*p*). He must also establish inducement and materiality (*q*), and all the other elements in the burden of proof which would rest on him in any ordinary action founded on fraudulent misrepresentation (*r*), the court being substituted for him as the representee, *quoad* the representation, but not the injury, which, of course, he must prove to have been occasioned to himself. This injury in ordinary cases is proved by the judgment itself, but in cases where the aggrieved person was not a party to the suit in which it was pronounced, he must show that his status, title, or rights were necessarily affected by it to his prejudice (*s*). He has only to prove the fact of such injury; no question of the amount of damage arises, for the action only lies for annulment, not for compensation. He must always explain why the matters alleged could not have been brought forward at the original trial (*t*). The proceedings, when instituted by the person aggrieved, or the defence, when such person relies on the improper procuring of the "judicial act" by way of plea, being alike in the nature of an assertion of the right to have the judgment invalidated or treated as invalid, are both subject to all such affirmative answers as would be available to any representor as against a representee asserting the invalidity of a contract in any form of

ordinary action for misrepresentation—see Ch. XV, Sect. 2, Sub-s. (1), *post*—mere general allegations of fraud will not do: *Birch v. Birch*, [1902] P. 130, *per* COZENS-HARDY, L.J., at p. 138.

(*p*) See *Guardhouse v. Blackburn* (1866), L. R. 1 P. & D. 108, *per* Sir J. P. WILDE at p. 116; *Betts v. Doughty* (1879), 5 P. D. 26; and *Birch v. Birch*, *sup.*, *per* COZENS-HARDY, L.J., at p. 138.

(*q*) That is to say, he must prove in ordinary cases that the court was induced to give the judgment by the misrepresentation, and that such misrepresentation was of a nature to produce that effect (see Ch. VI, *ante*, as to inducement and materiality). Thus in *Flower v. Lloyd*, No. 2 (1879), 10 C. D. 327, C. A., one of the grounds on which the plaintiff failed was that he had not established that the misrepresentations to the court were material (see pp. 332, 333); and in *Boswell v. Coaks*, *sup.*, the plaintiff failed to show that the disclosure of the whole truth to the court would have had any effect upon its decision (*per* Lord SELBORNE at pp. 170–174). Where it is a case of a consent judgment or order, or a compromise sanctioned by the court, the person claiming relief must prove primarily, as in ordinary cases, that he was deceived by the misrepresentation into consenting, and, incidentally, that the court was also deceived thereby into giving effect to such consent by a duly recorded "judicial act": see *Brooke v. Lord Mostyn* (1865), 33 Beav. 437, where TURNER and KNIGHT-BRUCE, LL.JJ., reversing ROMILLY, M.R., held that the plaintiff had shown that he was induced by misrepresentation and suppression of material facts and documents to agree to the compromise, and also that it was possible that the Master in Chambers might have been induced thereby to sanction it; *Eyre v. Smith* (1877), 2 C. P. D. 435, C. A. (inducement to creditors to consent to resolutions for liquidation by arrangement and to the registrar to register them); *Shurrock v. Littlejohn* (1898), 68 L. J. (q. b.) 165, Div. Ct. (consent of party to judgment under O. XIV); and *Wyatt v. Palmer*, [1899] 2 Q. B. 106, C. A. (where "the defendant induced the plaintiff to allow the defendant to enter judgment," etc.).

(*r*) As stated in Ch. X, Sect. 1, *ante*.

(*s*) As in *Perry v. Meadowcroft*, *sup.*

(*t*) In *Birch v. Birch*, *sup.*, it was held that there must be a suggestion in the statement of claim, if it is to escape being struck out as frivolous and vexatious, of such facts, only discovered since the trial, as, if proved, would render it reasonably probable that judgment should be upset, though the facts suggested need not necessarily be such as would have been evidence at the trial (*per* VAUGHAN WILLIAMS, L.J., at pp. 136, 137).

proceeding (*u*); such as a plea that the subsequent acts and conduct of the party have been of a nature to render it unjust, either to innocent third parties or to the guilty party himself, to disturb the "judicial act" (*x*), or pleas of knowledge, affirmation, and the like (*y*).

*Sub-sect. (2). Foreign Judgments procured by Fraudulent
Misrepresentation.*

409. A foreign judgment, that is to say, a judgment pronounced by any court not within the English jurisdiction, whether a court of a foreign State, or an Irish, Scottish, British Indian, or Colonial court, is, no less than an English judgment, and on no other principle (*z*), treated as void, and ignored by the courts of this country, on proof that it was obtained by the fraud of one or both of the parties (*a*), or by that of the court itself (*b*). It is not necessarily an answer to the plea that the evidence to prove the fraudulent misrepresentation is the very same evidence that was adduced in

(*u*) See Ch. XI, Sect. 4, Sub-ss. (1), (2), (4), and (5), *ante*.

(*x*) See *Davenport v. Stafford* (1845), 8 Beav. 503, *per* Lord LANGDALE, M.R., at pp. 522, 523.

(*y*) *Dunn v. Cox* (1853), 11 Harc. 61, where, though the plaintiff averred that he was ignorant of the true facts at the date of the consent order whereby the defendant was to pay, and duly paid him a certain sum of money, he carefully abstained from suggesting that he did not know of them at the time when he received the agreed sum. On this, and other, grounds PAGE-WOOD, V.-C., allowed the demurrer to the bill.

(*z*) The principle is that the defendant has entered into an implied contract to pay the amount of the debt declared by the judgment to be payable, and this principle is applicable to English and foreign judgments indifferently: *per* Lord ESHER, M.R., at p. 303 of *Grant v. Easton* (1883), 13 Q. B. D. 302, C. A.; Lord COLERIDGE, C.J., at p. 303 of *Abouloff v. Oppenheimer* (1882), 10 Q. B. D. 295, C. A.; and LINDLEY, L.J., at p. 316 of *Vadala v. Lawes* (1890), 25 Q. B. D. 310, C. A. Anything, therefore, which would invalidate any contract, such as fraudulent misrepresentation, would equally invalidate this particular type of implied contract.

(*a*) *Bank of Australasia v. Nias* (1851), 16 Q. B. 717, *per* Lord CAMPBELL, C.J., at p. 735; *Cammell v. Sewell* (1858), 3 H. & N. 617, *per* MARTIN, B., at p. 646; *Gossain v. Gossain* (1860), 8 W. R. 196 (an Indian judgment); *Ochsenbein v. Papelier* (1893), 8 Ch. App. 695, *per* Lord SELBORNE, L.C., and MELLISH, L.J.; *Abouloff v. Oppenheimer*, *sup.*; and *Vadala v. Lawes*, *sup.*

(*b*) See *Price v. Dewhurst* (1837), 8 Sim. 279, a case where the foreign tribunal, being interested in the suit, had fraudulently decided in its own favour, and where SHADWELL, V.-C., accordingly observes: "it would be idle to say that any regard or attention ought to be paid to such a proceeding as this" (p. 308), and, further, "the court is bound to treat this decision as of no value and no substance. And my opinion is that I am at liberty to deal with . . . the parties I find upon this record, and with the property, if they have received any by force of the judgment, just in the same manner as if" it had never been given (pp. 308, 309): and he concludes: "I am at liberty to declare that this foreign judgment, so far as it has tended to give any interest to Mr. Dewhurst, or any of the other defendants, is fraudulent and void" (p. 309). Cp. the opinion of MARTIN, B., at p. 646 of *Cammell v. Sewell*, *sup.*, who distinctly mentions "fraud in the court itself," as well as fraud practised upon the court by a party, as a ground for impeaching a foreign judgment. In *Abouloff v. Oppenheimer*, *sup.*, the defence, which was unsuccessfully demurred to, alleged fraudulent misrepresentation to, and concealment from, the High Court of Tiflis in the Caucasus, and also general corruption in that court itself. The last allegation was probably bad, as not averring any fraud of the court *in hac re*. The C. A. expressed no opinion on this point, the other allegations being clearly good: indeed it would seem that, when that stage in the litigation was reached, this plea had been expressly, or tacitly, abandoned.

support of the case set up by the aggrieved party before the court which pronounced the judgment (c); nor that the court was not ignorant of the truth (d). Only one, however, of the two kinds of relief available to the aggrieved party in the case of an English judgment is available to him in the case of a foreign judgment. The party may plead and prove the fraud by way of plea or answer to any action or proceedings in this country on the foreign judgment (e), or wherever in any such action or proceedings the foreign judgment is sought to be made use of in any manner as an obstacle to the success of his claim or defence, as the case may be; and he may ask the court to treat it as, and for this purpose to declare it to be, a nullity (f). Obviously he cannot resort to the other remedy, or take active proceedings in the courts of England for the purpose of rescinding or annulling any decree or order made by a court of a foreign State, or even a court of any part of His Majesty's Dominions other than England, on the ground that it was obtained by fraud. To do so, in the one case, would constitute a gross breach of the comity of nations, and almost a *casus belli*; and, in the other, it would at least be a grave excess of jurisdiction.

Sub-sect. (3). Awards of a Domestic Forum procured by the like means.

410. The award of a domestic forum rests upon the contract of the disputants to invest such forum with judicial authority as between themselves: and the court will enforce such contracts, and also the awards founded upon them, with certain recognized exceptions; one of which is, where the award was obtained either by fraudulent misrepresentation of a party made to the arbitrator, or by fraudulent collusion between him and the arbitrator, in which case the party aggrieved may either apply to the court to set aside the award, or may resist any action or proceedings founded upon it, and on proof of these facts, the burden of which is on him, he is entitled to the relief prayed (g), unless there has been an express agreement between the parties, which would appear to be valid (h), that neither of them should impeach the decision of the arbitrator on any suggestion whatsoever, even of fraud.

(c) *Aboulloff v. Oppenheimer*, *sup.*, per BRETT, L.J., at p. 307; and *Vadala v. Lawes*, *sup.*, per LINDLEY, L.J., at pp. 316-320.

(d) See the cases cited in notes (a) and (b), *sup.*

(e) See all the cases cited in note (a), *sup.*, except *Gossain v. Gossain*.

(f) See *Price v. Dewhurst*, cited in note (b), *sup.*, and *Gossain v. Gossain*, *sup.*, where a party, for the purpose of establishing his claim, was forced to rely on an Indian judgment procured by fraud, and in breach of a compromise of previous litigation, and this judgment being treated as a nullity, his claim fell with it.

(g) For the rules stated in the text, see Lord Halsbury's *Laws of England*, title, "Arbitration," vol. i, p. 478 (as to setting aside an award when the arbitrator has been deceived by the party), and p. 480 (as to the like, when the award has been procured by fraudulent collusion of one of the parties with the arbitrator).

(h) *Tullis v. Jacson*, [1892] 3 Ch. 440.

Sub-sect. (4). Misrepresentation to the Crown or Public Authorities.

411. Whenever the Crown, or an officer or department of the State, is induced by misrepresentation of material matters to grant any privilege to a subject, whereby the rights and interests of any other subject, or of the King's other subjects in general, must of necessity be proportionately curtailed, such grant, on the proper proceedings being taken by the proper parties, may be revoked, withdrawn, repealed, or avoided, or, without being so avoided, may be treated as void (*i*). This rule has been applied to grants by the Crown of lands and tenements (*k*), or of charters of incorporation (*l*), and to grants by the Crown, or by a department of State, such as the Patent Office, of privileges and monopolies in respect of inventions (*m*), trade marks (*n*), and other exclusive rights and licences (*n*).

412. The party entitled to raise the question of the invalidity of the grant by reason of misrepresentation to the Crown or State is, in the first place, the Attorney-General, as representing the Crown or State who have been deceived (*o*); and, secondly, every fellow-subject of the grantee who is directly or indirectly injured by the grant (*p*), or even one who is not interested, but only if those interested would be entitled to relief if they chose to apply for it (*q*), since the prerogative of the Crown in this respect is the privilege of the subject, and the Crown cannot fetter the exercise

(*i*) For the general principles applicable when the King is "deceived in his grant," see Com. Dig. Grant, G. 8. Similar rules obtained in Roman law with respect to the *fallax petitor* who obtained grants and privileges from the Emperor by misrepresentation: see App. C, Sect. 2, Sub-s. (14), *post*.

(*k*) See the following: *Case of Alton Woods* (1600), 1 Coke Rep. 40b; *R. et Reg. v. Kempe* (1694), 1 Ld. Raym. 49; *Morgan v. Seaward* (1837), 2 M. & W. 544 (*per Cur.* at p. 561); *Gledstanes v. Earl of Sandwich* (1842), 4 M. & G. 995; and *Great Eastern Railway Co. v. Goldsmid* (1884), 9 App. Cas. 927, H. L.

(*l*) See *R. v. Boucher* (1842), 3 Q. B. 641; *Eastern Archipelago Co. v. R.* (1853), 2 E. & B. 568, Exch. Ch.; and *La Banque d'Hochelaga v. Murray* (1889), 15 App. Cas. 414, P. C.

(*m*) *R. v. Wheeler* (1819), 2 B. & Ald. 345; *Hill v. Thompson* (1818), 8 Taunt. 375; *Bruntton v. Hawkes* (1821), 4 B. & Ald. 541; *Morgan v. Seaward, sup.*; and *Nickells v. Rolls* (1849), 8 C. B. 679. Letters patent in respect of inventions are now sealed with the seal of the Patent Office, and not, as previously, with the Great Seal of the United Kingdom: see Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 14, sub-s. (1), and the procedure for revocation is altered, but the theory on which a patent is revoked in case of misrepresentation, viz., that the State is deceived thereby into granting a privilege that it otherwise would not have granted, remains the same.

(*n*) Such as a right to take wreck: *Alcock v. Cooke* (1829), 5 Bing. 340.

(*o*) *Case of Alton Woods, sup.*; *R. et Reg. v. Kempe, sup.*; *R. v. Wheeler, sup.*; *Eastern Archipelago Co. v. R., sup.*; *La Banque d'Hochelaga v. Murray, sup.*; and *G. E. Railway Co. v. Goldsmid, sup.*

(*p*) See *Alcock v. Cooke, sup.*, *Morgan v. Seaward, sup.* (*per* PARKE, B., delivering the judgment of the Court of Exchequer, at p. 561: "such a grant is void not against the Crown merely, but in a suit against a third person"); *Eastern Archipelago Co. v. R., sup.*; and *Banque d'Hochelaga v. Murray, sup.* (where the defendants, who were entitled to raise the question of the invalidity of the grant of a charter of incorporation to a certain company, as incorporators of which they were being sued, fortified their position by procuring the Attorney-General of the Colony to proceed, on their relation, by way of *scire facias* against the company to repeal the charter, such proceeding being consolidated with the action).

(*q*) *Great Eastern Railway Co. v. Goldsmid, sup.*, *per* LORD SELBORNE, L.C., at pp. 937, 940.

and enjoyment of a privilege which is vested in it for the public good, so that, whether directly or indirectly in virtue of his right to call upon the Crown to exercise its prerogative, the subject is *ex debito justitiæ* entitled to have a franchise procured by misrepresentation forfeited (*r*).

413. The mode in which effect is given to the opinion of the court that the grant is void on the ground of misrepresentation, is either by a repeal—which must be *in toto*, or not at all (*s*)—of the charter or patent, at the instance of the Attorney-General, whether moving *ex officio*, or on the relation of a subject aggrieved (*t*), or by treating the grant as a nullity on the establishment by a party litigant of a right to have it so treated, where it is relied upon by the opposite party as the foundation of his case or a link in his chain of proof (*u*). The procedure to obtain the repeal of a charter, patent, or other grant, is information or action by way of *scire facias*, for which, however, in respect of patents, a petition to the court for revocation at the instance of the Attorney-General, or of any person aggrieved, is now substituted (*x*), and, in the case of trade marks, an application to the court by a person aggrieved, or, where the registration has been procured by fraud, the registrar himself, to make, expunge, or vary any entry in the register of trade marks (*y*). The defensive relief available to the party may be claimed by way of plea to an action for infringement of the patent (*z*), charter, or other instrument granting the privilege (*a*); and, further, in the case of patents for inventions, it is provided by statute that any such patent granted to the true and first

(*r*) *Eastern Archipelago v. R.*, *sup.*, per PLATT, B., at p. 884, CRESWELL, J., at p. 886, and JERVIS, C.J., at p. 914 in the Exchequer Chamber.

(*s*) *Banque d'Hochelaga v. Murray*, *sup.*, at pp. 426–428. Cp. Ch. XI, Sect. 3, Sub-s. (1), for the like rule in rescission.

(*t*) See the cases cited in note (*p*), *sup.*

(*u*) As in *Hill v. Thompson*, *sup.*, *Brunton v. Hawkes*, *sup.*, *Alcock v. Cooke*, *sup.*, *Morgan v. Scavard*, *sup.*, *Gledstanes v. Earl of Sandwich*, *sup.*, *Nickells v. Rolls*, *sup.*, and other cases cited in the various treatises on patent and trade mark law. In *R. v. Boucher* (1842), 3 Q. B. 641, where the immediate question for decision was the validity of a rate, which raised incidentally the further question of the validity of the charter of incorporation of the borough making the rate, the Court of Q. B., but with great doubt and hesitation, thought it safer not to decide the latter question, and to take the facts as they found them, the rate having been made by a borough which *de facto* existed as such, and none of the inhabitants having taken any steps to get the charter revoked.

(*x*) This procedure was introduced, and the old *scire facias* procedure abolished, in the case of patents for inventions, by sect. 26 of the Patents Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), which is reproduced in sect. 25 of the Patents and Designs Act, 1907 (7 Edw. 7, c. 29). The petition may be presented by the Attorney-General, or by any person authorized by him, or by a party aggrieved who can establish the prescribed matters: sect. 25 (3) of the Act of 1907. See Terrell on *Patents*.

(*y*) By sect. 12 of the Trade Marks Act, 1905 (5 Edw. 7, c. 16), any person may apply to the Registrar to register a trade mark in the register which (sect. 4) is to be kept at the Patent Office, and by sect. 35 authorizes the application for rectification of the register which is mentioned in the text. See Sebastian on *Trade Marks*.

(*z*) This ground of defence is expressly reserved by sect. 25 (2) of the Patents and Designs Act, 1907.

(*a*) See cases cited in (*u*), *sup.*, and Terrell on *Patents*, and Sebastian on *Trade Marks*, on the degrees to actions of infringement of patents and trade marks respectively.

inventor is not to be invalidated by any application made in fraud of him by, or any provisional protection granted to, another applicant, or by any user during the period of such provisional protection (*b*).

414. The party claiming to have the grant avoided, or treated as void, must prove that a representation, in the proper sense of the word (*c*), was made to the Crown or department of the State. "But where the words are the words of the King, and it appears that he has only mistaken the law, then he shall not be said to be deceived, to the avoidance of the grant" (*d*). The representation must be shown to have been made either in fact, as, for instance, in a petition or memorial (*e*), or declaration (*f*) on which the grant was founded, or presumptively; and such presumption is irrebuttably made when not to make it would necessarily involve an imputation on the honour of the Crown, or, in other words, where the choice is between an inference that the Crown was deceived by the party, and an inference that the Crown itself practised a deceit upon the grantee, as in the case of a grant to two of one and the same estate, or of overlapping estates or interests (*g*). But it is impossible to make any such presumption in cases where a grant is only made after a previous inquiry under a writ of *ad quod damnum* (*h*). Next, the burden is on the party impeaching the grant of proving that the statements actually or presumptively made, or to be implied from the express statements (*i*), were false (*k*). The

(*b*) See sect. 15 (1) of the Act of 1907.

(*c*) See Ch. II, *ante*.

(*d*) *R. et Reg. v. Kempe* (1694), 1 Ld. Raym. 49, *per* HOLT, C.J.

(*e*) As in *R. v. Boucher* (1842), 3 Q. B. 641 (a case of a petition or memorial by a borough praying a charter of incorporation).

(*f*) As in *Banque d'Hochelaga v. Murray* (1889), 15 App. Cas. 414, P. C. (where the misrepresentation was contained in a declaration verifying a petition for letters patent for the incorporation of a company).

(*g*) *Alcock v. Cooke* (1829), 5 Bing. 340, *per* BEST, C.J., delivering the judgment of the Court of Common Pleas, at p. 354. In *Gledstanes v. Earl of Sandwich* (1842), 4 M. & G. 995, TINDAL, C.J., delivering the judgment of the same Court, lays down, at pp. 1028, 1029, that "the cases in which the King's grant has been held to be avoided by reason of any misdescription or mistake therein . . . will be found to fall under one of three classes; first, where the King has by his grant professed to give a greater estate than he had himself in the subject-matter of the grant; . . . secondly, where the King has already granted the same estate, or part of the same estate, to another . . .; thirdly, where the King has been deceived in the consideration expressed in the grant; as when the consideration is untrue, or the subject of the grant has been recited to be of less value than it really is, or where . . . the King recites a former grant of an office for life, and then grants the same office to J. S., whereas in truth either the King had not granted the office for life, or the office had not been surrendered; here the grant would be void because there was no such consideration as was recited." In all three classes, the law must presume that the King was deceived by false information or suggestion on the part of the applicant.

(*h*) *Great Eastern Railway Co. v. Goldsmid* (1884), 9 App. Cas. 927, H. L., *per* Lord SELBORNE, L.C., at pp. 939, 940.

(*i*) In *R. v. Boucher* (1842), 3 Q. B. 641, the petition to the Crown referred to "the condition of the gaol," which was an implied representation that there was a gaol in the borough, and, there being none in fact at the time, an implied misrepresentation.

(*k*) In *Nickells v. Rolls* (1849), 8 C. B. 679, the Court of C. P. held that WILDE, C.J., had misdirected the jury in telling them that the burden was on the patentee of adducing some evidence that his representations to the Crown were true (p. 723).

misrepresentation proved must be shown to have been material (*l*), and to have induced the Crown to issue the charter or letters patent (*m*). Though in most of the reported cases the misrepresentation was both false and fraudulent, it does not appear that fraud must necessarily be proved, notwithstanding the constant use of such expressions as "the King is deceived in his grant," which merely import that the Crown has been misled into granting a privilege to a subject, to the prejudice of the rest of the community, which prejudice is the real justification for avoiding the grant, and is obviously unaffected by the question of the personal honesty or dishonesty of the grantee (*n*).

415. The above rules of the common law as to the grounds on which a grant may be avoided, or treated as void, are, in respect of patents for inventions, preserved by various provisions of the Patents and Designs Act, 1907 (*o*), to which there is added a further provision that it shall be an additional ground for revocation of a patent, that it was obtained in fraud of the petitioner's rights, or of the rights of any person through whom he claims (*p*). For the purposes of this specific statutory enlargement of the common law, the "fraud" which is required to be proved as a condition of the revocation has been construed as meaning "fraud" in the ordinary course of the word, that is, as something involving moral turpitude (*q*). In the case of trade marks, apart from the common law remedies, special statutory relief is available to any person who

(*l*) Illustrations of such material misrepresentations are those referred to in note (*g*), and (*i*), *sup.*; also misrepresentations as to the amount of subscriptions to the capital of a company proposed to be incorporated, as in *Eastern Archipelago Co. v. R.* (1853), 2 E. & B. 568, Exch. Ch.; as to the names of the petitioners for such an incorporation, as in *Banque d'Hochelaga v. Murray* (1889), 15 App. Cas. 414, P. C.; and as to the applicant for a patent for an invention having been the true and first inventor, as in *R. v. Wheeler* (1819), 2 B. & Ald. 355, *Brunton v. Hawkes* (1821), 4 B. & Ald. 541, *Morgan v. Seaward* (1837), 2 M. & W. 544, and *Nickells v. Rolls*, *sup.*

(*m*) *Brunton v. Hawkes*, *sup.*, per BEST, J., at p. 558: "That avoids the patent *in toto*. For the King is deceived; the patentee is represented to have the merit of two things, whereas he has discovered only one; and the Crown might have considered the discovery, as to both, a sufficient ground for granting a patent, when it would not have thought so of the discovery of one alone." And see the form of the third plea set out at pp. 684, 685 of *Nickells v. Rolls*, *sup.*, which, so far as inducement is concerned, exactly corresponds to the form of an ordinary plea of misrepresentation, substituting the Crown for the defendant as the representee: "that before the granting of the patents, the plaintiff represented to Her Majesty that, in consequence of a communication from abroad, he was in possession of an invention, etc., . . . and that Her Majesty, believing and confiding in the truth of the suggestion so made . . . granted the letters patent . . . that such representation was false, whereby the letters patent were null and void."

(*n*) Neither in *Gledstanos v. Earl of Sandwich*, *sup.*, nor in the form of plea in *Nickells v. Rolls*, cited in the last note, nor in *Eastern Archipelago v. R.*, *sup.* (where the voidability of the grant in cases of misrepresentation is put on the theory of a non-compliance with an implied condition), is there any suggestion that fraud need be alleged or proved.

(*o*) See sect. 25 (2) of the Patents and Designs Act, 1907.

(*p*) See sect. 25 (3) of the Act of 1907.

(*q*) *Re Avery's Patent* (1887), 36 C. D. 307, C. A. (per STIRLING, J., at pp. 319, 320, COTTON, L.J., at pp. 324, 325, BOWEN, L.J., at p. 325, and FRY, L.J., at p. 327, on the similar provision and expression in the Act of 1883); and *Re Ralston's Patent* (1909), 100 L. T. 386, per WARRINGTON, J., at pp. 387, 388. In the former case the "fraud" was proved: in the latter, it was not.

would be aggrieved by the registration of a mark "calculated to deceive or otherwise disentitled to protection in a court of justice" (r).

416. Where any licence or other official act is required to validate a contract or transaction which no court has jurisdiction to annul on the mere ground that it was procured by misrepresentation, such licence or other official act can no more be set aside or ignored on that ground than the contract or transaction itself (s).

Sub-sect. (5). "Passing off" Cases.

417. There is a class of misrepresentation made by a trader to the public in general, or to a section of the community, such as customers or purchasers, as to goods or articles dealt in by him, which gives a cause of action not only to any such purchaser or customer, but also to any third person, usually a rival trader, who is injured thereby (t). These are known as "passing off" cases, for the trader "passes off" on the public or palms off articles of his own manufacture or belonging to his own trade as and for articles—whether superior or inferior, is irrelevant—manufactured or dealt in by a rival manufacturer or trader, and which have acquired a reputation in association with the latter's name or trade. This is a misrepresentation, either express or by acts and conduct, that his goods are the goods of the competitor. No misrepresentation is made to the competitor himself, but, none the less, that competitor's proprietary rights and interests are invaded, and on this ground he has a cause of action for injunction or damages, which, though not strictly "an action of deceit" as now understood, comprises most of its elements (u), and was,

(r) By sect. 11 of the Trade Marks Act, 1905, which casts on the Registrar the duty of refusing to register.

(s) See Ch. XI, Sect. 1, Sub-s. (4), *ante*, as to this class of contract or transaction. In *Swift v. Kelly* (1835), 3 Knapp, 257; 40 R. R. 22, a suit by the husband for restitution of conjugal rights, one of the pleas was that the license for the marriage—which was a Roman Catholic one—had been obtained from the ecclesiastical authorities in Rome by a falsely pretended abjuration of the Protestant faith purporting to be made on behalf of the wife, but in fact without her consent or knowledge, and it was held by the Privy Council (Lord BROUGHAM, SHADWELL, V.-C., PARKE, B., and others) that this plea of "a fraud upon the Holy See" (so termed by PARKE, B., in the course of the argument, at p. 282), was clearly bad: Lord BROUGHAM, who delivered the judgment of the Judicial Committee, at p. 293, observing first that the marriage itself could not be dissolved on the ground of the alleged fraud—see § 266, *ante*—and then adding: "if such be the law touching consent to the marriage itself, and the fraud whereby true consent was obtained, it would be extraordinary indeed if another rule were allowed to govern the case where fraud has been practised upon a third party acting immaterially in granting the license to celebrate it." Similarly, no court can annul even a private, local, or personal Act of Parliament, or expunge a false recital of fact in its preamble, though proved to have been obtained by fraudulent misrepresentation; for what the legislature has done, only the legislature can undo. But, whether or not a court of law could ignore, and refuse to give effect or credence to, a recital procured by such means, is a doubtful question, which was raised in *Cromford and High Peak Railway Co. v. Lacey* (1829), 3 Y. & J. 80; 32 R. R. 733, but not decided.

(t) See Sebastian's *Trade Marks*.

(u) As stated in Ch. X, Sect. 1, *ante*. All these elements are common to the ordinary action for damages for misrepresentation and the action for "passing off," except that fraud need not be established (*Hendriks v. Montagu* (1881), 50 L. J. (CH.)

indeed, for a very long period in the history of our jurisprudence, deemed a species of that class of action (*x*). For this reason it has been thought right to notice this type of case in the present Chapter, but its detailed treatment belongs to another department of law (*y*).

456, C. A., *per* COTTON, L.J., at p. 461), and except that the plaintiff must prove that the public, and not he, was deceived; otherwise, falsity, inducement, and materiality must be proved in the one case as much as in the other, and no less rigorously. Thus in *London General Omnibus Co. v. Lavell*, [1902] 1 Ch. 135, C. A., an action for "passing off" a particular type of omnibus on the travelling public, FARWELL, J., thought himself at liberty to adopt a more summary method of determining the questions of materiality and inducement than would be permissible in an action of misrepresentation of the ordinary kind (see Ch. VI, *ante*), and decided in favour of the plaintiff on a mere view of the rival vehicles, without evidence, but the C. A. held, reversing him, that this course was wrong, and that the claim must be established in the usual way by evidence that the public, or some members of it, had in fact been deceived by the alleged similarity: see also *Hendriks v. Montagu, sup.*, *per* BRETT, L.J., at pp. 458, 459. It should be noted that the remedies also are different in the two cases to this extent that, in the passing off action, an injunction is the appropriate remedy, and not damages (except incidentally), and of course not rescission.

(*x*) See the *Gloucestershire Clothier's Case* (temp. Eliz.), of which a detailed account is given in § 452 and notes thereto, *post*. At pp. 453, 454 of *Singer Manufacturing Co. v. Wilson* (1876), 2 C. D. 434, C. A., MELLISH, L.J., said: "all actions of this nature must be founded on false representations. Originally, I apprehend, the right to bring an action in respect of the improper use of a trade mark arose out of the common law right to bring an action for a false representation, which of course must be a false representation made fraudulently. It differs from an ordinary action for false representation in this respect, that an action for false representation is generally brought by the person to whom the false representation is made; but in the case of the improper use of a trade mark, the common law courts noticed that the false representation which is made by putting another man's trade mark, or the trade name of another manufacturer, on the goods which the wrongdoer sells, is calculated to do an injury, not only to the person to whom the false or fraudulent misrepresentation is made, but to the manufacturer whose trade mark is imitated; and therefore the common law courts held that such a manufacturer has a right of action for the improper use of his trade mark." He then notices two extensions of the rules governing this class of action: on the one hand, courts of common law coming to consider it immaterial that the original purchaser is not deceived, if subsequent purchasers and sub-purchasers are, or may probably be, so deceived: on the other, courts of equity deeming it equally immaterial that the wrongdoer was not dishonest, if the other party's property is invaded: and thereupon, he adds: "the courts of equity having taken that step, trade marks began to be considered as property." The above observations are cited and adopted by STIRLING, J., at p. 6 of *Tallerman v. Dowsing Radiant Heat Co.*, [1900] 1 Ch. 1. It is to be noticed, however, that in *London General Omnibus Co. v. Lavell*, [1902] 1 Ch. 135, C. A., Lord ALVERSTONE, C.J., at p. 138, and VAUGHAN-WILLIAMS, L.J., at pp. 140, 141, described the action for "passing off" then before them as "an action of deceit," though the latter remarks that such actions "have in course of time come to be treated very much as actions brought against defendants for having trespassed upon private rights of the plaintiffs." And, surely, it may be added, this is the correct view. The ground of the plaintiff's complaint in an ordinary action of deceit is that he has been deceived by the defendant: in a passing off action,—that his property has been invaded, not that he has been deceived. An action of this kind is analogous to the action on the case for actual damage done to a man by the defamation of a third person (discussed in the author's *Code of the Law of Actionable Defamation*, Article 59). Injury to property is the gist and the essence of the "passing off" action. So the improper use of the name of an author, or the title of another's work, in literature, is correctly stated by JAMES, L.J., at p. 90 of *Dick v. Yates* (1881), 18 C. D. 76, C. A., as one of "the three modes" in which "literary property can be invaded."

(*y*) See the various treatises on Trade Marks and Trade Names (Sebastian, Kerly, etc.), and the long series of "passing off" cases cited therein.

SECT. 2. MISREPRESENTATIONS WHICH OPERATE FOR THE BENEFIT OR RELIEF OF PERSONS WHO WERE NEITHER REPRESENTEES NOR INJURED THEREBY.

418. In the class of cases considered in the foregoing Section, the persons entitled to relief, though not representees, have a ground of complaint as persons whose rights are prejudicially affected by the misrepresentation, and who, therefore, on their own merits, as well as on the demerits of the misrepresentors, are entitled to the remedies stated. But there is another class of case, in which the law allows a party who has no merits whatever, and is often, on the contrary, weighted with serious demerits, a way of escape from liability to actions brought against him by a person guilty of fraud upon third persons, not because it desires to do so, but because it cannot accomplish its paramount purpose of making such frauds unprofitable, and “not worth the candle,” to those who practise them, without at the same time incidentally setting unmeritorious persons free (z). In such cases the delinquent is deprived of the remedy to which he would otherwise be entitled on those considerations of public policy, morality, and decency,—and on those alone,—which imperatively demand the interposition of the court (whether the party raises the point or not) whenever the assertion of a claim, or of an affirmative defence, discloses illegality, immorality, or other *turpis causa*. The result is that the opposite party, who in all such cases is devoid of merits, and of course has no rights which he can assert in any active proceedings, and who sometimes is even implicated in the very fraud which defeats the claim, derives benefit and relief; but this is inevitable. In accordance with this inflexible principle, whenever, in the course of any action or proceeding it is made to appear to the court, by evidence or admission, that one of the parties has been guilty of acts and conduct in relation to the subject-matter of the litigation constituting, or necessarily involving, deception of, and injury to, not the opposite party, but third persons, whether specific individuals (a), or sections of the

(z) See the treatises referred to in the last note.

(a) The following are cases where the third person on whom the fraud had been, or was intended to be, practised, was a *persona designata*: *Montefiori v. Montefiori* (1762), 1 W. Bl. 362 (a suit between two brothers, in which it appeared that one of the *par nobile fratrum*, Moses, had given the other, Joseph, a note for a large sum falsely represented to be the balance of an account due on trading, for the purpose of enabling Joseph to delude a lady into marrying him, and Lord MANSFIELD, C.J., would not allow Moses to reclaim the note, after the marriage had come off, or to set up “no consideration” as a defence to Joseph’s claim under it); *Neville v. Wilkinson* (1782), 1 Brown C. C. 543 (in which Lord THURLOW, L.C., cites the last case “from a MS. note of Mr. Filmer”); *Jackson v. Duchaire* (1790), 3 Term. Rep. 551 (a very curious case, in which the defendant, having agreed to buy certain goods from the plaintiff at a valuation, procured one Welch to buy them for her of the plaintiff for £70, the price expressed in the bill of sale granted by the plaintiff to Welch. It appeared, however, that there was a contemporaneous agreement between the plaintiff and the defendant, kept secret from Welch, that the defendant should pay the plaintiff an additional £30 for the same goods, secured by two promissory notes of £15 each, on one of which the plaintiff sued. Lord KENYON, C.J., at the trial, without the defendant having raised the point, ruled that the action would not lie, on the ground that the transaction was a fraud upon, not the defendant but Welch, who, but for his belief that

community, such as creditors (b), customers and purchasers (c), the reading public (d), or investors and speculators in public undertakings (e), whether

£70 was the plaintiff's full price, would not have advanced the money, and this ruling was supported by the K. B.); *Dalbiac v. Dalbiac* (1809), 6 Ves. 116 (per GRANT, M.R., at p. 125: "it is impossible for the court to recognize and sanction a transaction in which the party has been guilty of an imposition upon it"); *Pidcock v. Bishop* (1825), 3 B. & C. 605 (per BAYLEY, J., at pp. 610, 611. "a contract which is a fraud upon a third person may on that account be void as between the parties to it"); *Sims v. Tufts* (1834), 6 C. & P. 207 (where the plaintiff, fearing an execution, entered into a fraudulent agreement with his landlord, the defendant, to destroy his receipts for rent, and to make a nominal and sham distraint upon his goods: whereupon the defendant, who was as ready to cheat the plaintiff, as the plaintiff was to cheat the execution creditor, proceeded to distrain upon the goods in real earnest, and the plaintiff sued him for conversion, which he justified as landlord, whereupon the plaintiff set up the agreement in reply. It was held that this agreement, being a fraud upon the execution creditor, could not stand as an answer to the defendant's affirmative plea which, therefore, grossly iniquitous as it was, was allowed to prevail); and *Hamilton v. Ball* (1840), 2 Ir. Eq. Rep. 191 ("a party to a fraud," *sc.* upon third persons, "cannot file a bill against his accomplice to prevent his taking more of the spoil than his share, for the court will not interfere to enforce honour among thieves").

(b) *Smith v. Cuff* (1867), 6 M. & S. 160; *Pidcock v. Bishop*, *sup.* (where composition agreements with creditors are referred to by way of illustration); *Howden v. Haigh* (1840), 11 A. & E. 1033; *Higgins v. Pitt* (1849), 4 Exch. 312 (per CUR. at p. 324); *Mullalieu v. Hodgson* (1850), 16 Q. B. 689, 712, 713, 714; and *Re Gomersall* (1875), 1 C. D. 137 (per JAMES, L.J., at pp. 140, 141, MELLISH, L.J., at pp. 143-145, BAGGALLAY, L.J., at pp. 146, 147, and BRETT, J., at p. 148), which was affirmed, *sub nom. Jones v. Gordon* (1877), 2 App. Cas. 616, H. L. The above were all cases where, a composition agreement or arrangement having been made between a debtor and his creditors, the basis of which is an implied representation by each creditor to all the others that he is not stipulating with the debtor for any separate advantage to himself, it has been held that such a stipulation, if secretly made, being a fraudulent misrepresentation to the other creditors (though it may also be put as a case of non-disclosure) cannot be enforced even against the equally fraudulent debtor. See, further, Lord Halsbury's *Laws of England*, title, "Bankruptcy and Insolvency," vol. ii. pp. 336, 337; and, as to when claims in the bankruptcy under such secret agreements will not be admitted to proof, or are otherwise affected, see p. 200 of the same volume.

(c) See *Pidding v. How* (1837), 8 Sim. 477 (where SHADWELL, V.-C., dissolved an *ex parte* injunction restraining the defendants from selling tea under the name of "Howqua's Mixture," by which the plaintiff's tea was known, on the ground that, though the defendant's conduct was pronounced to be most reprehensible, the plaintiffs were proved to have sold their tea by misrepresentations, in their labels and advertisements, to the purchasing public, as to the teas of which their "mixture" was composed, and as to the mode of its preparation). Other "passing off" actions and motions defeated under similar circumstances, and on the like grounds of fraudulent misrepresentation, express or implied from "make up," to purchasers and customers, though as between the parties, the defendants had no merits, are, *Leather Cloth Co. v. American Leather Cloth Co.* (1865), 11 H. L. C. 523, 543; *Newman & Co. v. Pinto & Sons* (1888), 57 L. T. 31, C. A.; *Lewis v. Goodbody* (1892), 67 L. T. 194; and *Bile Bean Manufacturing Co. v. Davidson* (1906), 8 F. 1181. In *Sen Sen Co. v. Britten*, [1899] 1 Ch. 692, STIRLING, J., recognized and accepted the principle of the above authorities, but (distinguishing in this respect *Lewis v. Goodbody*, *sup.*) thought that no misrepresentation to the public had in this case been clearly established.

(d) *Wright v. Tallis* (1845), 1 C. B. 893 (an action for infringement of copyright in a work entitled "Evening Devotions, etc., from the German of C. C. Sturm": plea, fraudulent misrepresentation to the public by the plaintiff, on the title page and in the preface, that the work was a translation from the German of Dr. Sturm, a devotional writer of repute, whereas it was not a translation at all, but the composition of a person in the employ of the plaintiffs, "to the great injury and scandal of Her Majesty's liege subjects," and, as the confessed thief had the unblushing audacity to add, "to the detriment of true religion and public morals." The court was compelled on demurrer to hold this plea good, on public grounds entirely, as TINDAL, C.J., delivering its judgment, was careful to explain at p. 907, where he characterized the plaintiff's proceedings as "a serious design to impose on the credulity of each purchaser . . . not merely to conceal the name of the author, and to publish opinions

the party so guilty is compelled to rely upon the acts and conduct to support a claim or an affirmative defence (*f*), such claim or defence cannot be enforced or have any effect, even against the opposite party (*g*); and for this purpose it does not signify whether the question is raised by the pleadings or not (*h*). But if the fraud on third persons which is proved or admitted relates to other matters than that which form the immediate subject of the action, there is no jurisdiction to deprive, on this ground alone, the party guilty of the fraud, if a plaintiff, of the judgment to which he is entitled on the merits of the dispute, or, if a successful defendant, of the costs which would otherwise follow the judgment (*i*).

to the world under an innocent disguise. . . . The publisher seeks to obtain money by false pretences. . . . We think the best protection that the law can afford to the public against such a fraud as that laid open by this plea is to make the practice of it unprofitable to its author"); *Post v. Marsh* (1880), 16 C. D. 395 (where the plaintiff sued for specific performance of a contract to execute certain literary work on a book, the title page of which falsely ascribed its authorship to one Kenny, whose guide-books had acquired a considerable reputation, and *FRY, J.*, gave judgment on two grounds, one of which—p. 406—was that this title page, if allowed to go forth to the world, would be a fraud on the public); and *Slingsby v. Bradford Patent Truck and Trolley Co.*, [1906] W. N. 51, C. A. (which affirmed the decision of *WARRINGTON, J.*, [1905] W. N. 122, that the publisher of an illustrated catalogue of trucks, etc., was not entitled to relief in an action for infringement of copyright, on the ground that the catalogue contained in the headings of its pages, and in its illustrations, a series of misrepresentations to the public).

(*e*) *Begbie v. Phosphate Sewage Co.* (1875), L. R. 10 Q. B. 491 (where the plaintiffs sued for money had and received by the defendants to their use, being money paid for the right to exercise a certain invention in Berlin, under a contract, the consideration for which, it was alleged, had failed, inasmuch as the defendant had no right to sell. In fact the defendants had no such right, but it was proved that the plaintiffs were fully aware of this fact, and had issued a prospectus misrepresenting to the prospective shareholders that they were acquiring a right to which they knew they would never be legally entitled: on this ground the Court of Queen's Bench gave judgment for the defendants, reversing the verdict for the plaintiffs in the court below—pp. 499, 500—which decision was affirmed (1876), 1 Q. B. D. 679, C. A.); *Re Great Berlin Steamboat Co.* (1884), 26 C. D. 616, C. A. (a case in which it was proved that one Bowden had deposited money with the company for the purpose of enabling it to obtain a delusive credit with bankers and others, and induce them to subscribe to the undertaking, and a claim, in the liquidation of the company, for the repayment of the money, on the accomplishment of the purpose for which it was deposited and used, was disallowed, on the ground that the design was a fraud upon the subscribers); and *Scott v. Brown, Doering, McNab & Co.*, [1892] 2 Q. B. 724, 729, 730, 734, C. A. (where the plaintiffs were proved to have conspired with the defendants to "rig the market" in shares of a certain undertaking, and so to have fraudulently misrepresented, by acts and conduct, to the investing and speculating public that the pretended dealings in the shares were genuine, and were accordingly held to have forfeited whatever rights they might otherwise have had even against the equally guilty defendants under contracts with reference to these shares).

(*f*) Thus in *Montefiori v. Montefiori*, and *Sims v. Tuffs*, cited in note (*a*), *sup.*, the fraud on third persons was the foundation of the affirmative case of the defendant, and of the plaintiff in answer to an affirmative plea, respectively.

(*g*) See, generally, the cases cited in the last six notes, and the observations of VAUGHAN-WILLIAMS, L.J., at p. 11 of *F. King & Co. v. Gillard & Co.*, [1905] 2 Ch. 7, C. A.

(*h*) The point was taken by the court, and not by the parties, in *Jackson v. Duchaire*, cited in note (*a*), *sup.*, and in *Scott v. Brown, Doering, McNab & Co.*, cited in note (*c*), *sup.* On the other hand, in *Wright v. Tallis*, cited in note (*d*), *sup.*, the point was raised specifically and in detail in the defendant's plea.

(*i*) *F. King & Co. v. Gillard & Co.*, *sup.*, per VAUGHAN-WILLIAMS, L.J., at p. 11, and ROMER, L.J., at pp. 12, 13.

CHAPTER XV.

JURISDICTION AND PROCEDURE.

419. To complete this Commentary, it only remains to discuss the question of jurisdiction, and such rules of pleading and practice as are special to actions or proceedings for misrepresentation, or have a special character in their application to them (*a*).

SECT. 1. JURISDICTION.

Sub-sect. (1). In Actions for Damages.

420. The action for damages may be brought in either the King's Bench, or the Chancery, Division (*b*) of the High Court of Justice, or, subject to the local and pecuniary limits of the jurisdiction in each case, in the Mayor's Court (*c*), in any County Court (*d*), or in any borough or local court of civil jurisdiction having authority to entertain actions of tort (*e*).

Sub-sect. (2). In Proceedings for Rescission.

421. The courts having jurisdiction to entertain actions or proceedings for rescission (*f*), or for money had and received (*g*), are the Chancery Division (*h*), and (subject, where rescission is claimed, to transfer in a proper case) the King's Bench Division of the High Court (*i*); the Chancery

(*a*) Sects. 1 and 2 of this Chapter deal with jurisdiction and procedure respectively.

(*b*) See the cases cited in the notes to § 201, *ante*.

(*c*) See Glyn's *Mayor's Court Practice*.

(*d*) See Lord Halsbury's *Laws of England*, title "County Courts," vol. viii, p. 446, note (*n*).

(*e*) See Lord Halsbury's *Laws of England*, title "Courts," vol. ix, pp. 129–213. For the tribunals having jurisdiction in the assessment of the damages, see § 240, *ante*. As to the jurisdiction of the Bankruptcy Court with regard to claims in the bankruptcy of the representor, see Ch. X, Sect. 5, *ante*.

(*f*) As described in Ch. XI, Sect. 3, Sub-s. (1), *ante*.

(*g*) As stated in Ch. XI, Sect. 3, Sub-s. (2), *ante*.

(*h*) See sect. 34 of the Judicature Act, 1873, whereby "the setting aside, or cancellation of deeds or other instruments" are amongst the matters assigned to the Chancery Division.

(*i*) Notwithstanding the enactment last cited, actions for rescission may be instituted, and, if no application is made by the defendant to transfer to the Chancery Division, may be maintained in the K. B. D., and actions for this purpose are quite commonly brought in the latter Division, without any objection, such as, to take one example out of many, *Moore v. Explosives Co.* (1887), 56 L. J. (Q. B.) 235, C. A. When such application is made, the court has a discretion to make the order, or to retain the action, as, in all the circumstances, may be deemed just and convenient: see sect. 11 of the Judicature

Courts of the County Palatine of Lancashire (*k*), and of the County Palatine of Durham (*l*); and (subject to the local and pecuniary limits to the jurisdiction) the Mayor's Court (*m*), the County Court (*n*), and any borough or local court of civil jurisdiction having authority to entertain proceedings instituted for the objects mentioned (*o*).

422. The statutory proceedings for rectification of the register of a company (*p*) may be instituted in the King's Bench or Chancery Division of the High Court in England or Ireland, and in the Court of Session in Scotland (*q*), and, where the company is within the stannaries, in the county courts exercising the stannaries jurisdiction (*r*), with which, however, the jurisdiction of the High Court is concurrent (*s*).

423. Application to vary the list of contributories in the winding up of a company (*t*) must be made to the judge or judges of the Chancery Division appointed to exercise jurisdiction in the winding up of companies (*u*), or, where the company is within the district of either of the two Counties Palatine, or of certain county courts, to the judges of such courts respectively (*x*), or, where it is within the stannaries, to the county courts exercising the stannaries jurisdiction (*y*).

Act, 1875, and Lord Halsbury's *Laws of England*, title "Courts," vol. ix, pp. 60, 61. The court will even, in a proper case, transfer an action for rescission from the C. D. to the K. B. D., as in *Forrester v. Jones*, [1899] W. N. 78, where the plaintiff sued in the C. D. to set aside a policy of insurance on the ground of misrepresentation, and the next day the defendant issued his writ against the plaintiff in the K. B. D. to recover the policy moneys, and BYRNE, J., granted an application to transfer the first action to the K. B. D., leaving it to the judge at the trial to decide whether the two actions should be consolidated, and whether both, or either, should be tried with, or without, a jury. As to the action of money had and received, this clearly belongs to both Divisions, because on the one hand it is in its nature an equitable form of action, and, on the other, it had its origin, under the auspices of Lord MANSFIELD, C.J., on the common law side: see § 276, *ante*. As to the jurisdiction of the Bankruptcy Court, see Ch. XI, Sect. 5, *ante*.

(*k*) See *Laws of England*, title "Courts," vol. ix, pp. 120-124.

(*l*) *Ibid.*, vol. ix, pp. 124-127.

(*m*) See Glyn's *Mayor's Court Practice*, pp. 7-18, as to the general jurisdiction of the Mayor's Court, and as to the equitable jurisdiction, pp. 21-29.

(*n*) See Lord Halsbury's *Laws of England*, title "County Courts," vol. viii, p. 444.

(*o*) See Lord Halsbury's *Laws of England*, title "Courts," vol. ix, pp. 129-213.

(*p*) As to that, see Ch. XI, Sect. 3, Sub-s. (3), *ante*.

(*q*) See sect. 32 (2) of the Companies (Consolidation) Act, 1908.

(*r*) See Lord Halsbury's *Laws of England*, title "Companies," vol. v, pp. 659-674, and title "County Courts," vol. viii, pp. 686, 687, and sect. 32 (2), and sect. 285 of the Companies (Consolidation) Act, 1908 (definition of "Court exercising the stannaries jurisdiction").

(*s*) *Re Penhale and Lomax Consolidated Silver Lead Mining Co.* (1867), 2 Ch. App. 398, *per* TURNER and CAIRNS, LL.JJ., at pp. 402-404. The same case decides that the mere fact that a company, established for working mines within the stannaries district, must necessarily carry out some of its objects outside it, does not oust the stannaries jurisdiction altogether, or make the C. D. jurisdiction an exclusive one.

(*t*) As to these, see Ch. XI, Sect. 3, Sub-s. (4), *ante*.

(*u*) See sects. 132, 285, of the Companies (Consolidation) Act, 1908, and Lord Halsbury's *Laws of England*, title "Companies," vol. v, pp. 391-393.

(*x*) As to the jurisdiction of the two Palatine Courts in the winding up, see Lord Halsbury's *Laws of England*, title "Companies," vol. v, p. 392; as to that of County Courts, *ibid.*, pp. 392, 393.

(*y*) As to the jurisdiction, in the winding up, of the County Courts exercising the stannaries jurisdiction, see Lord Halsbury's *Laws of England*, title "Companies," vol. v, pp. 672-674, and title "County Courts," vol. viii, pp. 686, 687.

424. Proceedings by summons under the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), are within the exclusive jurisdiction of a judge of the Chancery Division (z). In such proceedings, though it is not possible to raise, expressly and *eo nomine*, questions as to invalidity of the contract by reason of misrepresentation (a), there is, nevertheless, a class of case in which the court, in formally pronouncing judgment on a question which is expressed and purports to be one of title, at the same time decides a question of misrepresentation, because it so happens that the question may be regarded in either of these aspects (b).

Sub-sect. (3). In Statutory Proceedings.

425. The following courts have jurisdiction in respect of the statutory proceedings mentioned in Chapter XIII. Any court in which an ordinary action for damages for misrepresentation may be instituted (c), is also a court in which statutory compensation for untrue statements in prospectuses may be sued for (d). The statutory provisions as to sales of property by auction in no way affect the question of what courts may exercise jurisdiction over such sales (e). As to the other enactments referred to, where jurisdiction is conferred by the enactment on any particular court or tribunal in respect of any class of misrepresentation, such court

(z) Illustrations of these proceedings are to be found *passim* in the notes to Chapters XI and XII, *ante*. By sect. 9 of the Act, the jurisdiction is confined to the Chancery Division.

(a) For, by sect. 9 above cited, the application can only be made "in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract (*not being a question affecting the existence or validity of the contract*)"; so that, in strictness, there is no jurisdiction to avoid a contract on the ground of misrepresentation: see *Re Davis and Cavey* (1888), 40 C. D. 601, *per* STIRLING, J., at pp. 607-609.

(b) For, in exercising its undoubted jurisdiction to declare that no title has been shown by the vendor, and to order a return of the deposit with interest, and payment of the costs of investigating title,—see *Re Smith and Stott* (1883), 29 C. D. 1009 n., and *Re Hargreaves and Thompson's Contract* (1885), 32 C. D. 454, C. A.,—the court does, in certain cases, decide what is tantamount to, though not expressed to be, a question as to whether the contract was induced by misrepresentation, *e.g.* in those cases, of which several illustrations are to be found in the notes to Chapters XI and XII, *ante*, where the land is described as being of such and such a tenure, or as of such and such an acreage, or as comprising such and such properties, tenements, or parcels, and it appears that the vendor has not land of the exact tenure, or to the full extent described, which he can sell. In such cases, the state of things disclosed may be regarded in the light of a misrepresentation and misdescription of the property, as well as in the light of a failure to show title, and a decision in favour of the purchaser, though expressed in the latter form of words, is also a decision, in effect, that the purchaser is entitled to be relieved of his bargain on the ground that he was induced to enter into it by misrepresentation. Moreover, even where jurisdiction is expressly disclaimed to rescind a contract, or to return the deposit, a declaration may be made which is sufficient for all practical purposes, particularly when coupled with words leaving the purchaser free to sue for the return of the deposit and consequential relief—as in *Re Davis and Cavey*, *sup.*

(c) See § 420, *sup.*

(d) Since sect. 84 of the Companies (Consolidation) Act, 1908, makes no mention of any special procedure for the purpose of recovering the "compensation." See Ch. XIII, Sect. 1, *ante*.

(e) Sect. 7 of the Sale of Land by Auction Act, 1869, affects the mode of exercising jurisdiction in respect of the opening of biddings, but not the question of the courts entitled to exercise it. See Ch. XIII, Sect. 2, *ante*.

or tribunal has exclusive or concurrent jurisdiction, as the case may be (*f*) ; otherwise the common law jurisdiction, whatever it may be in the particular case, is not affected.

Sub-sect. (4). In Proceedings to set aside Judgments, Charters, Patents, etc., procured by Misrepresentation, and in " Passing off " Actions.

426. The question of jurisdiction in respect of actions and proceedings for the purpose of setting aside judgments, orders, awards, charters, patents, and the like, procured by misrepresentation, has been incidentally dealt with in the part of this Commentary in which the nature of those proceedings has been discussed (*g*), and is also the subject of the provisions of the Arbitration Act, 1889, so far as regards awards (*h*), and of the Patents and Designs Act, 1907 (*i*), and the Trade Marks Act, 1905 (*k*), so far as regards patents and trade marks respectively. Any court which has jurisdiction to grant an injunction at all has jurisdiction to grant such relief in a " passing off " action (*l*).

Sub-sect. (5). In Arbitrations.

427. Speaking generally, where parties have agreed to submit differences to arbitration, the domestic tribunal is invested by the disputants with authority and jurisdiction, as between those parties, to determine the differences so submitted, and the authority and jurisdiction is exclusive of any other, in the sense that, if either party sues in respect of any such difference in any court, and if, but not unless, the other party makes an application for that purpose to the court in question, the action will be stayed, unless the circumstances are such as to bring the case within any of the recognized exceptions (*m*). Amongst these recognized exceptions is any case where a party charged with fraudulent misrepresentation, or other fraud, insists on the dispute being tried in open court ; but a party who brings such a charge

(*f*) See Ch. XIII, Sect. 3, *ante*, and note that sect. 168 of the Merchant Shipping Act, 1894, therein referred to, confers jurisdiction upon a special tribunal, described as " the court " (in sect. 742) to " rescind any contract between the owner or master, and the seaman or apprentice, or any contract of apprenticeship," in case of " any dispute arising out of, or incidental to, their relation as such," which of course would include a dispute as to whether the contract was induced by misrepresentation.

(*g*) See Ch. XIV, Sect. 1, Sub-ss. (1), (2), (3), and (4), *ante*.

(*h*) See Lord Halsbury's *Laws of England*, title " Arbitration," vol. i, pp. 478-481, and Ch. XIV, Sect. 1, Sub-s. (3), *ante*.

(*i*) See §§ 413, 415, *ante*. The court in which the proceedings must be taken is, in England, the Court of the Judge of the High Court to whom the patents jurisdiction is assigned (see sect. 92 of the Act of 1907), and, in Scotland, Ireland, and the Isle of Man, the courts named in sects. 94, 95, 96.

(*k*) See, again, §§ 413, 415, *ante*. The jurisdiction in trade marks matters is exercisable by the High Court of Justice in England, the Court of Chancery of the Palatine Court of Lancaster, the High Court of Justice in Ireland, the Court of Session in Scotland, and the Courts in the Isle of Man : see sects. 3, 69, 70, and 71 of the Act of 1905.

(*l*) See Ch. XIV, Sect. 1, Sub-s. (5), *ante*. The courts which have jurisdiction to grant injunctions are not only the High Court, but also the Mayor's Court, the two Palatine Courts, and the County Courts.

(*m*) See sect. 4 of the Arbitration Act, 1889, and Lord Halsbury's *Laws of England*, title " Arbitration," vol. i, pp. 451-454.

has no right to a public trial of matters which he has agreed to submit to arbitration, if the other party expresses no desire for such a trial (*n*).

SECT. 2. PROCEDURE.

428. Under the head of procedure, it may be convenient to notice such rules of pleading, and points of practice (including costs), as are peculiar to actions or proceedings based upon misrepresentation, or upon fraud, and also to consider certain general rules of procedure in their application to such actions or proceedings.

Sub-sect. (1). Rules of Pleading in their Application to Misrepresentation and Fraud.

429. Whenever fraud (which, of course, includes fraudulent misrepresentation) is intended to be relied upon by either party to any action or proceeding, whether in support of, or by way of answer to, any claim, counter-claim, or affirmative defence, it must be distinctly alleged in that party's pleading, or affidavit (*o*). This does not mean that the party need necessarily use the word "fraud," if he sufficiently indicates, by apt and unambiguous language, that he means to rely upon the thing, as, for instance, by alleging acts and conduct which in law amount thereto (*p*).

430. Whenever fraud or misrepresentation is in fact alleged by a party, whether it was necessary for him to do so or not (*q*), and whether the allegation is contained in a statement of claim, counter-claim, or other pleading which asserts a right to active relief (*r*), or in a defence, reply, or other

(*n*) *Russell v. Russell* (1880), 14 C. D. 471, *per* JESSEL, M.R., at pp. 475-477, who criticized, in this respect, the observations of WICKENS, V.-C., at pp. 577, 578 of *Willesford v. Watson* (1871), 14 Eq. 572, as being too widely expressed.

(*o*) See *Davy v. Garrett*, cited in the next note, as to claims, etc. As to defences, see *Woodhouse v. Swift* (1836), 7 C. & P. 310 (where, under the practice of those days, it was ruled that misrepresentation of the quality of goods sold could not be set up as an answer to a claim for the price unless specially pleaded), and, for the modern practice, see O. 19, r. 15.

(*p*) *Myddleton v. Lord Kenyon* (1794), 2 Ves. 391, *per* Lord ELDON, L.C., p. 412; and *Davy v. Garrett* (1878), 7 C. D. 473, C. A., *per* THESIGER, L.J., at p. 489: "There is another still stronger objection to this statement of claim. The plaintiffs say that fraud is intended to be alleged, yet it contains no charge of fraud. . . . It may not be necessary in all cases to use the word 'fraud'—indeed, in one of the most ordinary cases it is not necessary. The allegation that the defendant made to the plaintiff representations on which he intended the plaintiff to act, which representations were untrue, and known to the defendant to be untrue, is sufficient. The word 'fraud' is not used, but expressions are used pointing at the state of mind of the defendant, that he intended the representations to be acted upon, and that he knew them to be untrue. It appears to me that the plaintiff is bound to show distinctly that he means to allege fraud." See Ch. V, Sect. 1, *ante*.

(*q*) As to the results, in the matter of costs, of unnecessarily pleading fraud, see § 443, *post*.

(*r*) *Redgrave v. Hurd* (1881), 20 C. D. 1 (*per* JESSEL, M.R., at p. 12, refusing relief by way of damages on the defendant's counter-claim, on this ground), and *Birch v. Birch*, [1902] P. 130, C. A. (*per* COZENS-HARDY, L.J., at p. 138: "a mere general allegation of fraud, without particulars, cannot avail"). The action here was to set aside a judgment on the ground that it had been obtained by fraud.

pleading by way of answer to any claim (s), or in any affidavit (t), full particulars of the alleged fraud or misrepresentation must be given (u), if the opposite party requires it, but not otherwise; for, though the party alleging fraud is rigorously confined at the trial to such particulars as he has given, or has been compelled by his adversary to give (x), it is too late to object to any insufficiency in this respect after verdict (y), and, on the same reasoning applied to modern practice, it would equally be too late at the trial, and before verdict (z). There would seem to be no reason why, in an ordinary case of misrepresentation, the party alleging it should be excused from giving the required particulars until he has obtained discovery (a).

(s) *Laurance v. Norreys* (1890), 15 App. Cas. 210, H. L. (*per* Lord HERSCHELL at p. 219: "a statement of claim which, if it discloses a concealed fraud within the meaning of the statute, does so in the barest fashion, with much that is most material left vague and undefined, when there ought to have been distinctness and precision": and Lord WATSON at pp. 221, 222: "there must be a probable, if not a necessary, connection between the fraud averred and the injurious consequences which the plaintiff attributes to it; and if that connection is not sufficiently apparent from the particulars stated, it cannot be supplied by general averments. Facts and circumstances in that case must be set forth, and in every genuine claim are capable of being stated. . . . The amount and kind of explanatory statement required in order to impart relevancy to such charges will necessarily vary according to circumstances." The action was one in which the plaintiff set up a case of concealed fraud by way of anticipatory answer to the defendant's plea of a statute of limitations; and *Bentley v. Black* (1893), 9 T. L. R. 580, C. A.

(t) *Wallingford v. Mutual Society* (1880), 15 App. Cas. 685, H. L. (*per* Lord SELBORNE, L.C., at p. 697, with reference to an affidavit under O. XIV, setting up fraud as a ground on which the defendant claimed to be allowed to defend: "with regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any court ought to take notice").

(u) See O. 19, r. 6, which expressly mentions "fraud" and "misrepresentation" as among the matters which the party pleading must particularize. The observations of Lord WATSON, cited in note (s), *sup.*, as to the amount and kind of details required being dependent upon the circumstances of the individual case, should always be borne in mind.

(x) *Cargill v. Bower* (1878), 10 C. D. 502 (*per* FRY, J., after referring to the previous authorities, at p. 516: "above all in cases of fraud the decision of the court must proceed *secundum allegata et probata*").

(y) *Smith v. Kay* (1859), 7 H. L. C. 750 (*per* Lord CHELMSFORD, L.C., at pp. 757, 758, and Lord CRANWORTH at pp. 763-768).

(z) Similarly, where justification is pleaded to an action of defamation, if the plaintiff is content with no particulars, or with inadequate particulars, of such plea, and does not apply for further and better, the defendant is left completely at large at the trial: *Hunter v. Sharpe* (1868), 4 F. & F. 983, and *Henson v. Clevee*, [1904] 2 Ir. R. 536.

(a) The cases in which discovery has been ordered to precede particulars are non-disclosure cases, where a fiduciary relation exists between the parties, and where, therefore, the party from whom the discovery is required is, in virtue of that relation, under a duty to make the disclosure, for breach of which duty he is being sued, such as *Whyte v. Ahrens* (1884), 26 C. D. 717, C. A.; *Leitch v. Abbott* (1886), 31 C. D. 374, C. A.; *Sachs v. Spielman* (1887), 37 C. D. 295; and *Edelston v. Russell* (1888), 57 L. T. 927; and cases in which the party alleges fraud upon a third person, such as *Waynes Merthyr & Co. v. D. Radford & Co.*, [1896] 1 Ch. 29 (though, in this case, CHITTY, J., on consideration, came to the conclusion that the particulars should come first, and, further, expressed his view that that was no hard-and-fast rule). It is obvious that, in both the above classes of case, the plaintiff does not, and cannot reasonably be expected to know the entire facts as to matters which, in the one case, are studiously concealed from him, and, in the other, pass between the defendant

431. An amendment of a pleading which raises a charge of fraud which has not appeared in any previous pleading, and where the charge is new in substance, and not merely in form, is not ordinarily allowed (*b*). But where the proposed amendments are designed merely to put into better shape, and to expand with greater detail, a case of misrepresentation which has already been raised in substance, it is proper to give leave to amend (*c*). And, in very special circumstances, and on special terms, an amendment raising a case of fraud for the first time, even at the trial, may be allowed (*d*). Where, in a motion for rectification of the register of a company which is based on fraudulent misrepresentation, there is at the hearing insufficient evidence of the fraud, or even of the falsity, alleged, an application for an adjournment will usually be refused (*e*).

432. Where a fraudulent state of mind (or its equivalent, the *scienter*) is alleged, it is not necessary to particularize the state of mind, any more than in other actions malice is required to be particularized. It is enough to give details of the misrepresentation or acts amounting thereto; any further description of the moral and mental condition of the person responsible could not possibly be anything but evidence, which is not pleadable (*f*). Nor is it incumbent on a representee to put a meaning upon the words alleged to have been used by the representor, or to add an innuendo, as if the action were one of defamation (*g*).

433. Where it is alleged that a fraudulent representation was made by and a third person. But, where a misrepresentation to himself is alleged, it is no less obvious that he is in a position to give full particulars without discovery, or, if he is not, he should not have brought his action. On precisely the same principle, the defamer who pleads justification to an action of defamation is not entitled to discovery from the man he has defamed before he gives particulars of the alleged truth of his imputations: *Zierenberg v. Lubouchere*. [1893] 2 Q. B. 183, C. A. (*per* KAY, L.J., at p. 187, who there carefully distinguishes the non-disclosure type of case above referred to).

(*b*) *Lawrance v. Lord Norreys* (1890), 15 App. Cas. 210, H. L., at p. 213 of which it appears that the plaintiff had been refused leave to amend by setting up concealed fraud, or a more adequate statement thereof, in the Q. B. D.

(*c*) *Cocksedge v. Metropolitan Coal Consumers' Association* (1891), 65 L. T. 432, C. A.

(*d*) *Riding v. Hawkins* (1889), 14 P. D. 56, where, in a probate action, it appeared from admissions made by the defendant in cross-examination at the trial that the plaintiff might have had a possible case of fraud, which he had not pleaded, whereupon BUTT, J., gave him leave to amend by adding an allegation, with particulars, that the execution of the will was obtained by the fraud and misrepresentation of the defendant, at the same time offering the defendant a postponement of the trial to enable him to meet the new charges. This course, though a new trial was ordered on another ground, was approved by the Divisional Court, Sir JAMES HANNEN, P., and A. L. SMITH, J., who said (at p. 59) that, under such circumstances, it was the judge's "duty to allow the plaintiff to amend his pleadings, always taking care that the defendant was exposed to no hardship," which precautions had been taken in the case under appeal.

(*e*) *Re British Burmah Lead Co., Ex parte Vickers* (1887), 56 L. T. 815 (*per* KAY, L.J.).

(*f*) Sec O. 19, r. 22.

(*g*) *Barley v. Walford* (1846), 9 Q. B. 197, where, at p. 199, there are thirteen lines of innuendo pleaded, in the form used in cases of defamation or the quasi-defamation constituted by "disparagement of property," and where Lord DENMAN, C.J., at p. 209, observes that "the objection that the innuendo is larger than the representation"—an objection appropriate to actions of defamation—"is answered by the remark that no innuendo is required."

one who had the express or implied authority of another, and that other is sued, it is correct to plead such facts as the fraudulent misrepresentation of the principal (*h*).

434. Where misrepresentation is set up as a defence to an action to enforce a contract, it is incumbent on the defendant to allege in his pleading that, from the time when he discovered the truth, he never recognized any liability, or asserted any right, or derived any benefit, under the contract, but did what in him lay to disaffirm it (*i*).

435. Except as above stated, there is nothing special or distinctive in any rule of pleading as applied to actions for misrepresentation.

Sub-sect. (2). Certain Rules of Practice relating to Proceedings for Misrepresentation.

436. There are certain general rules of practice as to (1) joinder of parties and causes of action, and (2) mode of trial or hearing, and procedure thereat, which, in their application to actions of misrepresentation, seem to demand some notice (*k*).

437. As to joinder of parties and causes of action, it is first to be noted that, where there are several persons claiming to have been deceived by the same misrepresentation, as, for instance, allottees of shares suing in respect of misstatements in a prospectus, each of them can sue separately, or all, or any number of them, can sue together (*l*), but each of them must nevertheless in that case prove his separate right to relief (*m*); or an order may be made for one of several actions to be tried first as a test action (*n*): no "representative" proceedings, however, can be instituted in such a case; that is to say, none of the representees can sue on behalf of himself and all others constituting the class of persons deceived, or for this purpose take advantage of the modern rule relating to "numerous persons" (*o*);

(*h*) *Barwick v. English Joint Stock Bank* (1867), L. R. 2 Exch. 259, Exch. Ch., *per Cur.* at pp. 266, 267.

(*i*) See § 344 in Ch. XII, Sect. 2, *ante*.

(*k*) The first of these topics is considered in §§ 437-439, and the second in §§ 440, 441, *inf.*

(*l*) In *Arnison v. Smith* (1881), 41 C. D. 348, C. A., there were fifty-two shareholders suing together. In *Drincqbier v. Wood*, [1899] 1 Ch. 393, several debenture holders joined as plaintiffs.

(*m*) *Arnison v. Smith, sup.*, is a good practical illustration of this necessity. Out of the fifty-two plaintiffs, only forty appeared at the trial, to prove their individual cases; the other twelve were absent, in the mistaken idea that any judgment in favour of the forty who did appear would ensure for their benefit also. The consequence was that KEKEWICH, J., was compelled to give judgment against them, though the forty, who proved inducement and the other ingredients in the cause of action, succeeded, and the C. A. was unable to say that there was any escape from this result, however probable it may have been that the absent twelve would have established their case as easily as the others, if they had been there to do so: their appeal, therefore, was dismissed, though "without prejudice to a fresh action" (pp. 374, 375).

(*n*) See the cases cited in note (*r*), *inf.*

(*o*) Community of interest or of liability alone justifies a representative suit: *per* SHADWELL, V.-C., in *Long v. Yonge* (1830), 2 Sim. 369. There is no such community in proceedings for damages or for rescission on the ground of misrepresentation: the case of each representee, *quoad* inducement and other matters, has its own separate

the reason being that, though questions as to the making of the representation, and its falsity or fraud, and materiality, are common to every member of the so-called "class," every other question, and particularly that of inducement, is special to the individual. A. may prove that he read the prospectus, and was induced; B. may not be able to prove both these facts; C. may not be able to prove either; whilst D. may not be able to prove damage, or E. his title to rescission, if the action is for that species of relief (*p*). If, however, no application is made before the trial to strike out so much of the title of the action as purports to give it a "representative" character, the plaintiff's case cannot be dismissed, but will be heard as if he were suing on his own behalf alone (*q*).

438. The usual practice, in such cases, is to resort to the "test action" form of order above referred to. The procedure is as follows. The representatives issue separate writs in the first instance, and immediately upon doing so an application is made in chambers to select one of the actions as a test, and to stay all the others until after the trial of the test action, the plaintiffs in the other actions to be bound by the result if the defendant succeeds, but the defendants not to be bound if the plaintiff in the test action succeeds, for some of the other plaintiffs may not be able to prove inducement, damage, etc., or affirmative defences may be available against some of them which were not available against the plaintiff in the test action. Terms are inserted in the order to protect any of the plaintiffs in the outstanding actions from being prejudiced by any collusive or incompetent conduct of the test action (*r*).

equity: *Croskey v. Bank of Wales* (1860), 4 Giff. 314 (*per* STUART, V.-C., at p. 330); and *Hallows v. Fernie* (1868), 3 Ch. App. 467 (*per* Lord CHELMSFORD, L.C., at p. 471). The rule relating to representative actions is O. 16, r. 9.

(*p*) See *Arnison v. Smith*, *sup.* A good illustration of the distinction between an action which is representative, and one which is not, is furnished by *Stroud v. Lawson*, [1898] 2 Q. B. 44, C. A., where the plaintiff (1) on his own behalf sued directors of a company for damages for misrepresentation, and (2) in the same action, sued the company, on behalf of himself and the other shareholders of the company, in respect of an alleged improper payment of dividend, and it was held (*per* A. L. SMITH, L.J., at pp. 48, 49, and CHITTY, L.J., at pp. 51, 52) that the two causes of action were absolutely distinct, and mutually exclusive, since, in the first, the plaintiff could not sue on behalf of the other shareholders, and, in the second, he could not sue otherwise.

(*q*) This course was adopted in *Hallows v. Fernie*, *sup.*

(*r*) See *Twycross v. Grant*, No. 1 (1877), 2 C. P. D. 469, where, without applying to the court, an arrangement was made between the parties to the effect stated in the text (see pp. 473, 474). In *Amos v. Chadwick*, No. 1 (1877), 4 C. D. 869, there were seventy-eight actions for misrepresentation in a prospectus of the Blochairn Iron Co.: on the application of the plaintiffs in all of them to consolidate, MALINS, V.-C., declining to make an order for this purpose on the ground that it could only be made at the instance of a defendant, acceded to an alternative application that, on the plaintiffs in two of the actions, *Robinson v. Chadwick*, and *Smith v. Chadwick*, undertaking to prosecute them with due diligence, these two should be taken as test actions, and the time for the delivery of statement of claim in the others enlarged until after the trial of such test actions, imposing the condition that if the plaintiffs therein failed, all the other plaintiffs were to accept the result as conclusive, but that if they succeeded, the defendants were not to be bound, but might call on any of the other plaintiffs to proceed to trial (pp. 872, 873). These terms gave no adequate protection to these other plaintiffs against collusion between the plaintiffs in the test actions and the defendants, as was made apparent in *Robinson v. Chadwick* (1878), 7 C. D. 878, when an application was first made by Robinson to MALINS, V.-C., to stay proceedings, which

439. Another rule that has an important bearing upon actions for misrepresentation is that several plaintiffs may sue, and several defendants may be sued, together in respect of several causes of action, if those causes "arise out of the same transaction, or series of transactions" (s), and if evidence in support of the one cause of action would be evidence in support of the other (t), but not otherwise. Thus it is not allowable for a representee to sue on his own behalf three directors of a company for fraudulent misrepresentation, and also, on behalf of himself and all other shareholders, sue the company for a declaration that the payment of a certain dividend was illegal and *ultra vires*, and for consequential relief (u); but a plaintiff may in one action sue several defendants for misrepresentation and non-disclosure in a prospectus, though the remedies sought as against these various defendants are separate and distinct remedies (such as rescission, repayment, and rectification of the register as against the company, and damages for common law and statutory misrepresentation, and for statutory non-disclosure, against the directors), because the act or transaction which furnishes the plaintiff with his ground of complaint is one and the same, viz. the issue of the prospectus (x).

440. As to place and mode of trial or hearing, the rules applicable to actions of tort or contract in general apply to actions of deceit and rescission respectively (y). In the King's Bench Division, it is usual to order trial by jury in cases of fraud, though "fraud" is not one of the causes of action mentioned in O. 36, r. 2 of the R. S. C., as giving the parties a right to this mode of trial. There is power in the Chancery Division to direct an issue involving a charge of fraud to be tried by a jury, but the power is rarely exercised, except in cases where it is proposed to transfer the whole action to the King's Bench Division, and, even in these, it is

was refused on the ground that he was not *dominus litis*, but a trustee for the other plaintiffs, and again to FRY, J., at the trial, for postponement or leave to discontinue, which was also refused, and the action dismissed with costs. Thereupon the plaintiffs in the other actions,—see *Amos v. Chadwick*, No. 2 (1878), 9 C. D. 459, C. A.—applied successfully to MALINS, V.-C., to reinstate *Smith v. Chadwick* as a test action, the other having proved no test, and the C. A. affirmed this decision. To complete the history of this litigation, the plaintiff in the last-named action succeeded, and the judgment was affirmed by the C. A., and ultimately by the H. L., in *Smith v. Chadwick* (1884), 9 App. Cas. 187, H. L. For an elaborate form of order for a test action, see that made by FIELD, J., in *Bennett v. Lord Bury* (1880), 5 C. P. D. 339, at p. 346.

(s) O. 16, r. 1, which should be read in conjunction with O. 18, r. 1.

(t) *Stroud v. Lawson*, [1898] 2 Q. B. 44, C. A., where, on the ground stated in note (p), *sup.*, the statement of claim was ordered to be struck out, unless the plaintiff elected to abandon his claim against either the company or the directors (*per* A. L. SMITH, L.J., at pp. 50, 51, CHITTY, L.J., at p. 52, and VAUGHAN-WILLIAMS, L.J., at pp. 54, 55).

(u) *Ibid.*

(x) *Frankenburg v. Great Horseless Carriage Co.*, [1900] 1 Q. B. 504, C. A., *per* LINDLEY, M.R., at pp. 508, 509 (who distinguished *Gower v. Couldridge*, [1898] 1 Q. B. 348, C. A.) and ROMER, L.J., at pp. 510-512. This case was followed and applied, though the action was not for misrepresentation, in *Compañía Sansinena v. Houlder*, [1910] 2 K. B. 354, C. A.

(y) See Parts I and II of Order 36 of the R. S. C., as to mode of trial generally in the High Court. As to the mode of trial in other courts, see the books of practice relating to such courts respectively.

often thought more convenient to make the larger form of order at once (z).

441. The rules of procedure applicable to various statutory and special remedies and forms of relief in respect of misrepresentation have been incidentally discussed in foregoing portions of this Commentary (a).

*Sub-sect. (3). Rules as to Costs in relation to Actions for
Misrepresentation.*

442. No practice is more firmly established than that which visits a party with the costs of an unproved charge of fraud, though he succeeds in his action or defence. This rule, which is of course not a *regula scripta*, but a rule of conduct or judicial discretion, has been applied in the normal type of case by a long succession of equity judges, whose decisions on questions of costs are unappealable, unless there are no materials on which the court could have exercised the discretion by which it purported to be guided (b). But where the trial is by judge and jury, and not by judge alone, the occasions for the exercise of the discretion are less frequent, and the process is a little more circuitous; but on the whole, the discretion is exerciseable within much the same limits, and on substantially the same principles, in the two classes of case. For though costs follow the event where the trial is by judge and jury (c), the "event" is construed distributively; so that, if there is a distinct issue of fraud, the party who fails to prove it is liable to pay the opposite party his costs of such issue, without any special order, though succeeding on all other issues (d); and, further, even when the unproved allegation of fraud is not an issue in the technical sense, yet, if it has added to the burden and bitterness of the litigation, there is abundant "good cause" to deprive the successful party of the whole of his costs (e), and, *à fortiori*, to deprive him of the costs involved in making the allegation, and to order him to pay to the opposite party his costs of resisting it, or to make any other exceptional form of order which in the circumstances may be just (f). It is true that the discretion does not exist if there is no

(z) As was done in *Re Martin* (1882), 20 C. D. 365, C. A., and *Forrester v. Jones*, [1899] W. N. 78.

(a) See Ch. X, Sect. 3 (§ 240); Ch. XI, Sect. 3, Sub-ss. (3), (4), and (5), and Sect. 4, Sub-s. (6); Ch. XIII; and Ch. XIV, Sect. 1, *ante*.

(b) As was held to be the case in *F. King & Co. v. Gillard & Co.*, [1905] 2 Ch. 7, C. A. Cp. also the case cited in note (o), *inf.*, and *Civil Service Co-operative Society v. General Steam Navigation Co.*, [1903] 2 K. B. 756.

(c) O. 65, r. 1.

(d) *Ibid.*, and see the cases cited in the notes thereto in the *Annual Practise*, under the heading,—“Shall follow the Event.”

(e) See *Forster v. Farquhar*, [1893] 1 Q. B. 564, C. A., *per Cur.* at p. 570: “for all purposes of justice these separate heads of controversy were different issues, though not different issues, nor even issues at all in the pleader’s sense of the word.”

(f) For illustrations of the various forms of “exceptional order” made by equity judges, see the cases cited in notes (h) and (k), *inf.* The like varieties of order have been made by judges trying cases with juries, in the exercise of their discretion, on the appearance of “good cause.”

“good cause”; but the absence of “good cause,” which, in a case tried before a judge and jury, would debar the judge from exercising his discretion, would equally debar a judge sitting without a jury from exercising it, according to the more recent authorities (*g*).

443. The rule is applied to two classes of case: first, where fraudulent misrepresentation is unnecessarily alleged in an action to support which innocent misrepresentation would be enough (*h*), or where the charges of fraud are put too high (*i*); and secondly where, the cause of action not being misrepresentation at all, the party has chosen to introduce gratuitous and irrelevant charges of fraudulent misrepresentation (*k*). In all such cases, though the party, if otherwise entitled to succeed, is not, ordinarily at least, deprived of his right to judgment (*l*), he is, in the absence of exceptional circumstances, mulcted in costs to a greater or less degree, according to the view which the judge takes of the conduct of both parties throughout the litigation (*m*). On the other hand, a judge has no right to exercise his discretion—again, unless the circumstances

(*g*) See the cases cited in note (*b*), *sup*.

(*h*) As in *Champion v. Rigby* (1840), 9 L. J. (N. S.), (CH.) 211 (*per* Lord COTTENHAM, L.C., at p. 216, who dismissed a bill to set aside a contract with costs, which otherwise would have been, and in fact was in the court below, dismissed without costs, on the ground that wholly unnecessary charges of fraud had been introduced); *Shackleton v. Sutcliffe* (1847), 1 Dr. & Sm. 609 (where a defendant who had established his defence to an action for specific performance on the ground of misdescription of the property and non-disclosure of easements, chose to import into the case offensive imputations upon the plaintiff's honesty, which were not in the least required for the purposes of his defence, and was accordingly deprived by KNIGHT-BRUCE, V.-C., of his costs “so far as increased by the defendant having imputed fraud or unfair intention to the plaintiffs or their solicitors,” p. 623); *Rawlins v. Wickham* (1858), 3 De G. & J. 304 (plaintiff deprived of costs of action, because he had put his case of fraud too high, *per* KNIGHT-BRUCE, L.J., at p. 315); *Parker v. McKenna* (1874), 10 Ch. App. 96 (where so much of the bill as alleged fraud was dismissed with costs, and the plaintiff was deprived of his costs of the residue of the bill on which he succeeded, *per* Lord CAIRNS, L.C., at pp. 122-124, and JAMES, L.J., at p. 125); and *Thomson v. Eastwood* (1877), 2 App. Cas. 215, H. L. (where, under similar circumstances, the same form of order was made, except that the plaintiff in this case was not deprived of the costs of the residue of his claim). It will be understood that the above are selections merely from a mass of authorities, the examples chosen being representative of the principal varieties of punitive order usually made.

(*i*) *Rawlins v. Wickham*, *sup*.

(*k*) As in *Forester v. Read* (1870), 6 Ch. App. 40 (which was an action for specific performance of an agreement of compromise, where, therefore, all that had to be proved was the making of the agreement, and the non-performance of it by the defendant, and the plaintiff chose to add imputations that the acts and omissions were accompanied by fraud. He failed in his action, which was accordingly dismissed with costs, but there was added to the decree a special direction that he should pay to the defendant his costs, as between solicitor and client, so far as they had been increased by the charges of fraud: *per* JAMES and MELLISH, LL.JJ., at pp. 42, 43); and *Consort Deep Level Gold Mines, Ltd., Ex parte Stark*, [1897] 1 Ch. 575, C. A. (where, in a motion to rectify the register, the sole questions being whether there had been a contract between him and the company in virtue of a certain underwriting letter, and whether he was estopped from denying the existence of such a contract, the successful applicant had alleged, quite gratuitously, that the underwriting letter had been procured by fraud, and he was accordingly ordered to bear his own costs, and pay his opponents' costs, so far as increased by the importation of these charges: *per* LINDLEY, L.J., at p. 594).

(*l*) See § 251, in Ch. XI, Sect. 1, Sub-s. (2), *ante*.

(*m*) See notes (*h*) and (*k*), *sup*.

are exceptional (*n*)—in the opposite direction, by dismissing without costs the action of a plaintiff who has based his case on fraud and failed to prove it. The defendant is entitled to have the action dismissed with costs (*o*), and, in a proper case, the court may give him his costs as between solicitor and client (*p*). There is no jurisdiction, however, whether the case is simple (*q*), or complicated (*r*), to give a party costs on the higher scale, on the mere ground that he has been exposed to an unfounded charge of fraud.

444. Trustees, volunteers, mere agents (in cases of rescission), stakeholders, and parties joined for conformity, who are in no way implicated in any fraud charged, or guilty of any other misconduct, such as making common cause with any of the other parties, are entitled to their costs, whatever happens to their co-defendants (*s*). But any such defendant who is shown to have been guilty of the conduct in question is not only not so entitled, but may be ordered to pay costs (*t*).

(*n*) As, for instance, when the word “fraudulently” is used, and fraud is proved in the extended equitable sense of the word, though not in the popular or common-law sense: *Traill v. Baring* (1864), 4 De G. J. & S. 318 (*per* KNIGHT-BRUCE and TURNER, LL.JJ.); or where the representor has said something which called for an explanation, and that explanation, though given at the trial, and found satisfactory, was withheld until that date: *Patch v. Ward* (1867), 3 Ch. App. 203 (*per* Lord CAIRNS, L.J., at pp. 210, 211, who, however, recognized the soundness and importance of the general rule); or where the representor, though not guilty of fraud, has been guilty of improper conduct of some other nature: *Bagnall (John, & Sons) v. Carlton* (1877), 6 C. D. 371, 401–405, 409–411, C. A. (where solicitors, having been guilty of proceedings which, though not fraudulent, were very questionable, were deprived of their costs down to the date of a certain compromise), and *Angus v. Clifford*, [1891] 2 Ch. 449, C. A. (*per* LINDLEY, L.J., at p. 468, BOWEN, L.J., at pp. 474, 475, and KAY, L.J., at p. 481: culpable negligence).

(*o*) *New Brunswick and Canada Railway and Land Co. v. Conybeare* (1862), 9 H. L. C. 711.

(*p*) *Forester v. Read*, *sup.*

(*q*) *Paine v. Chisholm*, [1891] 1 Q. B. 531, C. A.

(*r*) *Assets Development Co. v. Close Brothers & Co.*, [1900] 2 Ch. 717, *per* BUCKLEY, J., at pp. 719–721.

(*s*) O. 65, r. 1, as to trustees. As to agents and others, in cases of rescission, see Ch. XI, Sect. 6, Sub-s. (2), *ante*.

(*t*) As in *Bowles v. Stewart* (1803), 1 Sch. & Lefr. 209, where a solicitor who had assisted a client in procuring a release by fraud was held by Lord REDESDALE, L.C., (Ir.), to have been properly made a defendant, and was ordered to pay the costs, so far as the person primarily liable failed to do so (p. 227); and *Bagnall v. Carlton*, *sup.*

APPENDICES.

APPENDIX A.

HISTORY AND CRITICISM OF THE PLACE AND TREATMENT OF
DECEIT AND FRAUD IN ENGLISH JURISPRUDENCE.

445. It is proposed to offer here some observations on the history of the action of deceit and of the concept of fraud in English law, for the purpose of establishing the unsoundness of the view—entertained, it must be admitted, by the highest authorities (*a*)—that the meaning of “fraud” is, and in all stages in the growth of our jurisprudence has been, co-extensive with its popular meaning (*b*), and, as the result of this investigation, to append a criticism of the existing law of misrepresentation, both in point of terminology, and in principle and substance (*c*).

SECT. I. HISTORY OF THE COMMON LAW ACTION OF DECEIT.

446. It is unfortunate that the term “action for fraudulent misrepresentation” is so frequently described as synonymous with “action of deceit,” which implies that actions of deceit have always assumed the same form. This, however, is very far from being the fact, as a cursory reference to the history of forms of action will at once demonstrate.

Sub-sect. (1). Earliest Form of the Writ of Deceit.

447. The earliest traceable form of the writ of deceit was the *breve de deceptione* existing in the time of King John (*d*). The relief given by this writ was of an extremely limited character. The only deceit against which it was directed was *deceptio curiæ*, a form of wrong which (see Ch. XIV, Sect. 1) is not now considered as technically coming within the conception of misrepresentation at all. No other kind of fraud was the subject of any writ or special remedy in those times, when it was deemed much more vital to preserve the King’s peace from turbulence and violence than the individual subject’s private property from invasion. And even the deception in question was regarded rather as an offence against the King than as a private injury to the party (*e*). The person guilty of thus obtaining a judgment from the King’s Court was liable to imprisonment in the first place, though he might also be sentenced to amerce the party; he was summoned *ad respondendum tam regi quam parti* (*f*). At a later date we are told by Fitzherbert that “this writ lieth properly when one man doth anything *in the name of another*, by which the other person is damnified and deceived; then he who is so damnified shall have his writ,” which looks as if personation of any kind was then the proper subject of the action, but, on reference to the form of the writ which Fitzherbert sets out, and the illustrations which he there

(*a*) See note (*p*) to § 457, *post*.

(*b*) See Sects. 1-4 of this Appendix.

(*c*) See Sect. 5 of this Appendix.

(*d*) Pollock and Maitland’s *History of English Law*, vol. ii, p. 533.

(*e*) *Ibid.*, pp. 534, 535.

(*f*) Com. Dig. Action on the Case for a Deceit, F. 1.

gives of the matters in respect of which it was usually issued, it becomes apparent that, in his time, the remedy was still limited to cases of a party procuring judgments by personation, or a sheriff making false returns, or an officer of the Crown conspiring with a party to commit any improper act in his office, or collusive recoveries, and the like (*g*).

Sub-sect. (2). The Action of Deceit in its Second Stage.

448. After the lapse of two centuries or so from the period above referred to, the action of deceit had entered upon the second stage of its history: that is to say, its limits had begun to be extended so as to comprise other species of tort, and this process of expansion continued until by the date at which Sir John Comyns published his Digest, the term "deceit" included not only several of the acts now considered to belong to the province of misrepresentation, but also a miscellaneous collection of wrongs which are undoubtedly outside it, whilst at the same time excluding at least one important head of misrepresentation as now understood.

449. Thus, in the time of Henry VI, we find what would in these days be considered an action of negligence, if such action were still deemed to lie at all (which it is not), described as an action of deceit: "Si jeo retaine luy d'estre de mon counsel al Guildhall en Londres, al certes jour, sil ne vient al jour, per que mon cause perish, action de disceit gist vers luy" (*h*). Much later, in the time of James I, the case (*i*) which is famous for having evoked, or being supposed to have evoked, the proposition of CROKE, J., that "fraud without damage, and damage without fraud, gives no cause of action" (*k*), and which is entitled in the report "a special action upon the case for a deceit," turns out, on examination of the facts, to be nothing but an action of either negligence or breach of contract, as it would now be understood, the ground of complaint being that the plaintiff contracted with the defendant to supply a team of horses to carry a load of a stated weight, and the defendant "super-onerated" the team with a much larger weight, whereby the horses were compelled *ita vehementer laborare et trahere*, that seven of them *ratione inde peribant*, to the plaintiff's great damage and loss (*l*). Again, when Coke lays down that "if the client would have the attorney to plead a false plea he ought not to do it, for he may plead *quod non erat veraciter informatus, et ideo nullum responsum*, and this shall be entered into the rolls to save him from damages in an action of deceit," he clearly regards as coming within that description what is now a very familiar type of action for negligence (*m*).

450. The number of wrongs included under the head of "deceit" had, by the time of Comyns' Digest, received enormous increment. The term then seems

(*g*) Fitzherbert, *De Naturâ Brevium*, pp. 95-100. The form of writ there given summons the delinquent "as well to answer Us as the aforesaid A., wherefore he fraudulently and maliciously in our Court of Chancery obtained our certain writ in the name of the aforesaid A., who was wholly ignorant of this, in deceit of our Court to the great damage of the said A."

(*h*) 20 H. 6. 24, pl. 1, cited in Rolle's Abridgm. p. 91.

(*i*) *Baily v. Merrell* (1615), 3 Bulstr. 94; Cro. Jac. 386; 1 Rolle Rep. 278. The principle on which an action of this description was thought to lie is stated succinctly and unqualifiedly at p. 275 of Rolle's report: "si jeo loane un chivall a carrier bois, et il superonerate le chivall, per que jeo luy perde, jeo avera action vers luy pur le deceit et damage."

(*k*) See § 204 in Ch. X, Sect. 1, *ante*.

(*l*) The three reports are at variance as regards figures and details in the narrative of the facts, but the substance is as stated in the text, and in note (*i*), *sup*. The court was inclined to think that the plaintiff had not brought the facts within the principle enunciated, and "directed this matter to stay till the plaintiff moved the same again, and no judgment pronounced one way or other; but the plaintiff, perceiving the opinion of the court to be against him, never moved the court again herein," 3 Bulstr. 96.

(*m*) Coke, 2 Inst. 215.

to have been as vague and comprehensive as "malice" in the earlier stages of our law (*n*), or *fraus* in Roman law (*o*), or "fraud" in such expressions (still current) as "in fraud of his contract," or "in fraud of his promise," meaning thereby no more than a breach of the contract or promise (*p*). It was apparently made to indicate almost every kind of tort other than assault or defamation. Comyns included amongst his illustrations of "deceit" such miscellaneous matters as the following: tricks and cheating "in play" (*q*); forgery (*r*); personation (*s*); breach of duty as trustee (*t*); the like in an official position (*u*); "other falsity," by which he means dishonesty (*x*); "false affirmations on other occasions," the examples given being mainly cases of false pretences (*y*); and "passing off" cases (*z*). The above may, in each case, cover acts of express or implied misrepresentation, though they may also include acts which could not be so described. But he adds to the list other wrongs which no one at the present day would term "deceit," such as negligence, whether assuming the form of want of care, or want of skill in one who *spondet peritiam artis* (*a*), vexatious proceedings in litigation, oppression (*b*), and that which is now regarded as the very antithesis of misrepresentation, viz. "false warranty" (*c*), whilst he expressly excludes the "falsity without warranty" (*d*), which, according to the modern view, if actionable at all, is pure misrepresentation.

451. The assimilation of actions for breach of warranty, or later (when *assumpsit* came to be substituted for *warrantizando vendidit* in pleadings) of actions for breach of promise, to actions of deceit, may be traced as a survival in declarations down to at least 1842, until which date it was quite usual to append to the averments of warranty, undertaking, promise, and breach, allegations of deceit, fraud, subtlety, and craft, as well as falsity, on the one side, and trust, confidence, reliance, and inducement on the other (*e*). Indeed, Lord

(*n*) Particularly in the law of defamation (as attempted to be shewn App. II of the author's *Code of the Law of Actionable Defamation*), and in the law relating to conspiracy, and procurement of breaches of contract by a third person, as to which Lord MACNAGHTEN, at p. 144 of *Allen v. Flood*, [1898] A. C. 1, H. L., confessed: "sometimes, indeed, I rather doubt whether I understand that unhappy expression myself." The old form of writ cited in note (*g*) *sup.* couples "fraudulently" and "maliciously," using the terms as practically synonymous.

(*o*) As distinguished from *dolus*, though the latter expression is also extremely comprehensive: see App. C, Sect. 1.

(*p*) Though the expression "in fraud of a person's rights," when used in a statute, has been construed strictly: see the two cases cited at the end of note (*n*) to § 459, *post*.

(*q*) Com. Dig. Action on the Case for a Deceit, A. 1.

(*r*) *Ibid.*, A. 2.

(*s*) *Ibid.*, A. 3.

(*t*) *Ibid.*, A. 5.

(*u*) *Ibid.*, A. 6.

(*x*) *Ibid.*, A. 8.

(*y*) *Ibid.*, A. 10.

(*z*) *Ibid.*, A. 9.

(*a*) *Ibid.*, A. 7, described as deceit "in a man's trade," and the illustrations given are the negligence, or incompetence, of a furrier, surgeon, tailor, etc.

(*b*) *Ibid.*, A. 4.

(*c*) *Ibid.*, A. 11.

(*d*) *Ibid.*, E. 4.

(*e*) See, for instance, *Stuart v. Wilkins* (1778), 1 Dougl. 18 (a case in which *assumpsit* was pleaded instead of *warrantizando vendidit*, according to a practice which ASHURST and BULLER, JJ., said was then well settled, and where an averment that the defendant "undertook and then and there faithfully promised that the said mare was sound" is followed by an allegation of the plaintiff's "confiding," etc., and of the defendant's "contriving and fraudulently intending," etc., and of his having "craftily and subtly deceived the said David," etc.); *Parkinson v. Lee* (1802), 2 East, 313 (a sale of hops by sample, in which the defendant "did not regard his said promise, but thereby deceived and defrauded the plaintiff"); *Williamson v. Allison* (1802), 2 East, 446 ("falsely and fraudulently warranted," and "falsely, fraudulently, and deceitfully

ABINGER, C.B., as late as the year 1840, expressed the bold and comprehensive view that "every action for breach of promise, or of warranty," as well as "of misrepresentation, in equity comes within the legal definition of fraud" (f).

452. From the earliest times, if the *Gloucestershire Clothier's Case* (g) is to be treated as a "passing off" case (h), the action of deceit was deemed to include an action by a trader against a competitor for misrepresenting to the public goods of his own make as goods of the plaintiff's make, to the prejudice of the plaintiff's

sold the said claret"); *Pickering v. Dowson* (1813), 4 Taunt. 779 ("false and fraudulent warranty" of a ship pleaded in the first count of the declaration, and fraudulent misrepresentation in the others); *Jones v. Bright* (1829), 5 Bing. 533 (a case of breach of warranty, pure and simple, if there ever was one, but labelled in the headnote as "an action in the nature of deceit," in which it was alleged, with much pomp and circumstance, that "the defendant falsely and fraudulently deceived the plaintiff . . . by then and there falsely and fraudulently warranting the said sheets of copper to be," etc.); *Bywater v. Richardson* (1834), 1 A. & E. 508; *Brown v. Edgington* (1841), 2 M. & G. 279; and *Moens v. Heyworth* (1842), 10 M. & W. 147 (where there were three counts, the first alleging that the defendant had "falsely and fraudulently warranted," and the others that he had "falsely and fraudulently represented," the copper to be . . . etc.).

(f) At p. 377 of *Cornfoot v. Fowke* (1840), 6 M. & W. 358.

(g) This is an anonymous case, which it is convenient to cite by the title given it in the text. It is not the subject of any report, but is referred to in a summary fashion by DODRIDGE, J., at p. 471 of *Southern v. How* (1617), Cro. Jac. 468, at p. 144 of the same case as reported in Poph. 143, and at p. 28 of the same case as reported in 2 Rolle Rep. 26. The accounts of the case are meagre, and vary materially in one important point, viz. as to whether the vendor or the rival trader was the plaintiff, and also as to the date of the decision, which is given as 33 Eliz. by Croke, as 22 Eliz. by Popham, and as 23 Eliz. by Rolle. The importance of identifying the character in which the plaintiff is supposed to have sued is manifest: if he sued as vendee, the case is one of ordinary misrepresentation by acts and conduct: if he was the competing trader, it is one of the earliest, if not the earliest, reported instance of a "passing off" action.

(h) As it probably is. It is true that, in Croke's report, *sup.*, we read that "Doderidge cited a case to be adjudged 33 Eliz. in the Common Pleas. A clothier of Gloucestershire made very good cloth, so that in London if they saw any cloth of his mark, they would buy it without searching thereof; and another who made ill cloth put his mark upon it without his privity; and an action upon the case was brought by him who bought the cloth, for this deceit; and adjudged maintainable." Rolle reports the case substantially as above, except that he concludes "mes Mr. Justice Doderidge ne dit pur qual d'eux ceo gist, lou pur le Cloathier que premierement avoit le dit marke, on pur le vendee, mes semble que gist pur le vendee," whereas Croke reports that DODERIDGE, J., did say who was the plaintiff, viz., the vendee, at whose instance Rolle thought that it ought to lie. Popham, on the other hand, distinctly reports DODERIDGE, J., as giving the cause of action to the clothier: "Doderidge saith that 22 Eliz. an action upon the case was brought in the Common Pleas by a clothier that, whereas he had gained great reputation for his making of his cloth, by reason whereof he had great utterance to his great benefit and profit, and that he used to set his mark to his cloths, whereby it should be known to be his cloth; and another clothier perceiving it, used the same mark to his ill-made cloth, on purpose to deceive him, and it was resolved that the action did well lie." It seems, on the whole, quite clear that the action was brought by the clothier who made the good cloth, otherwise there was no point in the elaborate introductory references in all three reports to the excellence of his manufacture, and his success and reputation in trade. And the case has so been regarded by Lord HARDWICKE, L.C., in *Blanchard v. Hill* (1742), 2 Atk. 484, 485 (who speaks of the defendant having acted "with a fraudulent design to put off bad clothes by this means, or to draw away customers from the other clothier"), and by PAGE-WOOD, V.-C., at pp. 427, 428 of *Collins Co. v. Brown* (1837), 3 K. & J. 423, (another "passing off" case, in which the above passage from Lord HARDWICKE's judgments is cited). Further, in note (b) to p. 386 of the judgment of CRESSWELL, J., who cites the case from Popham's report, in *Crawshay v. Thompson* (1842), 4 M. & G. 357, Serj. Manning, a most accomplished jurist, remarks that its citation in *Southern v. How*, *sup.*, would not have had much point or relevancy, if the action is supposed to have been brought by the vendee. And, in his note to 61 R. R. 555, Sir Frederick Pollock seems to take the same view.

proprietary rights and interests. This class of case, however, if not technically an action of deceit, as it is even now considered to be by some high authorities (*i*), undoubtedly approaches it very nearly, and has many features in common with it, and for that reason has already been dealt with in the Chapter devoted to forms of action which are on the border line of misrepresentation proper (*k*).

Sub-sect. (3). The Action of Deceit in its Present Form.

453. Early in the nineteenth century, the action of deceit gradually began to be understood in its present limited sense, as an action for damages for fraudulent misrepresentation made by the defendant to the plaintiff inducing him to alter his position to his damage. And, once having learnt to apply the term "deceit" to that which alone is "deceit," as a separate and distinct cause of action, the law becomes as prudishly strict in maintaining the assigned boundaries as, in the immediately preceding stage, it had been lavish and lax in extending them. Particularly is this tendency noticeable in the extreme reluctance which several of the common law judges evinced, from 1789 to at least 1818, to apply the principles of the law of deceit to the case of misrepresentation of a third person's credit, imbued, as they were, with the idea that the so-called application was really an extension of that law, and a dangerous one; the grounds assigned being that, for the first time, representations which were not part of a contract were made as much the subject of liability as those which were; further, that statements made with the object of helping a third person, and not with that of injuring the representee, or benefiting the representor, ought not to be treated as fraudulent; and, lastly, that the innovation tended, if not to repeal, to give a way of escape from the salutary provisions of the Statute of Frauds (*l*). This criticism, and the opposition founded upon it, was quite irrational (*m*), but, initiated by GROSE, J. (*n*), it was persisted in by LAWRENCE, J., LE BLANC, J. (*o*), Lord

(*i*) See note (*x*) to § 417, *ante*.

(*k*) See Ch. XIV, Sect. 1, Sub-s. (5), *ante*.

(*l*) See the references in the next six notes.

(*m*) As regards evasion of the Statute of Frauds, the criticism seems to have been particularly irrational, as pointed out by Lord KENYON, C.J., at p. 103 of *Haycraft v. Creasy* (1801), 2 East, 92. The fears expressed were that, by pleading an oral guarantee as an oral representation, the party could "evade" the statute, which requires guarantees to be in writing. But pleading cannot evade anything. Only proof of the allegations pleaded can bring the case outside a statute. If, on the evidence the alleged representation is shown to have been a contract, it is amenable to the Statute of Frauds, however skilfully it may have been pleaded as a representation. If there is no evidence of the statement being other than a contract, the judge so rules: if there is evidence both ways, the issue goes to the jury, in the same manner as any other issue of fact in a case of this description. The mere declaring upon a misrepresentation will not make the action one of misrepresentation, if the facts disclose a cause of action on contract only; just as, conversely, the mere declaring on a contract will not make the cause of action one of contract, if on the evidence it appears that there was only a misrepresentation: *Thompson v. Bond* (1807), 1 Campb. 4; *Read v. Hutchinson* (1813), 3 Campb. 352. There could have been no difficulty in properly directing a jury on these points so as to avert the supposed dangers, and Lord ELDON, when sitting in the Common Pleas, does not seem to have found any: see note (*u*), *inf*.

(*n*) The dissentient judge in *Pasley v. Freeman* (1789), 3 Term. Rep. 51. See his judgment at pp. 52-56, which proceeds mainly on the grounds that the defendant was not party to the contract between the plaintiff and Falck, and had no interest in it, and was not colluding with him, and that the representation was no part of such contract; some one or more of which facts he considered to be, according to all the previous authorities, essential elements in the cause of action. To this opinion GROSE, J., adhered at pp. 105, 106 of *Haycraft v. Creasy*, *sup.*, though he was of course bound to recognize *Pasley v. Freeman*, *sup.*, as having overruled it.

(*o*) LAWRENCE, J., at pp. 106, 107, and LE BLANC, J., at pp. 108, 109, of *Haycraft v. Creasy*, *sup.*, stated their agreement with the views of GROSE, J., but, as in his case, could not deny that *Pasley v. Freeman*, *sup.*, was binding on them.

ELLENBOROUGH, C.J. (*p*), DALLAS, J. (*q*), and PARK, J. (*r*), though discountenanced by Lord KENYON, C.J. (*s*), Lord MANSFIELD, C.J. (*t*), and, ultimately, by Lord ELDON, L.C. (*u*), who, however, admitted that "it was long before he was reconciled" to the doctrine which was the subject of the criticism (*x*). It should be added, however, that this hostile attitude, though not justified in so far as it was intended for an attack on the judicial exposition of the law originating in *Pasley v. Freeman* (*y*), was by no means without justification in so far as it disclosed a legislative oversight, and a *casus omissus* in the Statute of Frauds (*z*). Nor, in this latter aspect, was it without practical utility, for it bore fruit, though rather late fruit, in the passing of the Statute of Frauds Amendment Act, 1828, under the auspices of Lord TENTERDEN, C.J., a measure which, together with the decisions interpreting it, has already been commented upon (*a*).

SECT. 2. THE CONCEPTION AND TREATMENT OF FRAUD AS APPLIED TO MISREPRESENTATION AT COMMON LAW.

454. "Fraud," in the action for damages for fraudulent misrepresentation, has since about the middle of the last century (*b*) been understood in the common law courts in the sense in which it is now understood (*c*). But it must not be supposed that this result was achieved *uno saltu*, or that, as has been said or assumed by certain authorities whose opinion is entitled to the highest respect (*d*), that the modern definition of a fraudulent misrepresentation issued complete in all its members from the *gremium iudicis*, like Athene, in full panoply, from the forehead of Zeus. On the contrary, the process was one of slow stages, and it was some time before the common law disposition was habituated to treat as fraudulent a misrepresentation which was not known to be false, though not

(*p*) In *De Graves v. Smith* (1810), 2 Campb. 532, where he seems to have deliberately disregarded *Pasley v. Freeman*, *sup.*, and to have decided according to his own personal views, remarking that, if he were to rule otherwise, he would be "repealing the Statute of Frauds."

(*q*) In *Ames v. Milward* (1818), 8 Taunt. 637, at p. 642 ("these actions ought not to be encouraged").

(*r*) In *Ames v. Milward*, *sup.*, at p. 642 ("in *Pasley v. Freeman* great objections were made to the action the novelty of which is within all our recollections. Justice LE BLANC's opinion in *Haycraft v. Creasy* gave universal satisfaction").

(*s*) In his dissentient judgment in *Haycraft v. Creasy*, *sup.*

(*t*) See *Hamar v. Alexander* (1806), 2 B. & P. (N. R.) 241, at p. 244.

(*u*) At p. 186 of *Evans v. Bicknell* (1801), 6 Ves. 174, where he expressed his view that *Pasley v. Freeman* was an evasion of the Statute of Frauds, but adds that, whilst accepting that decision, as he was bound to do, when sitting as C.J. of the Common Pleas, he obtained many verdicts from juries for defendants by explaining to them the dangers which lurked behind the doctrine of that case.

(*x*) At p. 110 of *Ex parte Carr* (1814), 3 Ves. & Beames, 108; 13 R. R. 158.

(*y*) (1789), 3 Term. Rep. 51.

(*z*) In *Tapp v. Lee* (1803), 3 B. & P. 367, Lord ALVANLEY, C.J., at p. 370, invites legislation on the subject, pointing out forcibly the existing anomaly: "if a man say, 'if you trust A., I will pay you,' he is not liable upon the credit which he has obtained for A.; yet, if he say that A. is a good man, he is held liable for the credit which by that assertion he obtained for A."

(*a*) See Ch. X, Sect. 2, Sub-s. (4), and the cases cited in the notes thereto, particularly *Lyde v. Barnard* (1836), 1 M. & W. 101, where the history of the common law which led up to the passing of the statute is discussed, and the judges of the Court of Exchequer (*per* Lord ABINGER, C.B., at pp. 117-119, GURNEX, B., at pp. 103, 104, ALDERSON, B., at p. 107, and PARKE, B., at pp. 114, 115), give a parting kick to *Pasley v. Freeman*, and remark how justified by the event was GROSE, J.'s, prophecy of the crop of litigation to spring from that decision.

(*b*) *Taylor v. Ashton* (1843), 11 M. & W. 401, may, perhaps, be said to mark the point at which the modern doctrine had fully matured, and before which it was *in fieri*.

(*c*) See Ch. V, Sect. 1, *ante*.

(*d*) See note (*p*), *inf.*

known or believed to be true (*e*), or one which was not actuated by any intention to injure the representee, or to benefit the representor, or to injure or benefit anybody (*f*).

SECT. 3. THE CONCEPTION AND TREATMENT OF "FRAUD" AS APPLIED TO MISREPRESENTATION IN EQUITY.

455. "Fraud" has always been treated by Chancery Judges as a *nomen generalissimum*. This generic term, in equity, has from the earliest times (*g*) been used to connote no more than a transgression of equitable rules, and to denote no less than every species of act or omission which can reasonably answer to that description, such as non-disclosure, unaccompanied by misrepresentation, in contracts and relations *uberrimæ fidei* (*h*), abuse of the influence arising from a dominant position on the one side, and incapacity or distress or necessity on the other, unconscionableness, oppression, and the like, though nothing is more certain than that actual dishonesty, or "fraud" in the common law sense, is not required to render such acts or omissions actionable. A great master of equity jurisprudence includes within his description of "constructive fraud" all "such acts and contracts as, although not originating in any actual evil design . . . are yet, by their tendency to deceive or mislead other persons . . . deemed equally reprehensible with positive fraud, and therefore are prohibited by law, as within the same reason and mischief as acts and contracts done *malo animo*" (*i*). This high authority admits that these doctrines "may seem to be of an artificial, if not of an arbitrary, character; yet," he contends, "on closer observation they will be perceived to be founded on an anxious desire of the law to apply the principle of preventive justice" (*k*). The apology, however, should have been made, not for the doctrines, which are admirable, but for the nomenclature, which is vile. There is nothing "artificial" or "arbitrary" in applying the principles of public policy and "preventive justice" to acts of which the tendency is mischievous, whatever the intention may have been. The "arbitrariness" is in describing these acts by a name in popular use to which they do not answer,—with the inevitable consequence that those who affix the epithet and stigma are forced to explain that they do not attach to it the meaning which the rest of the world does,—instead of simply laying down that certain acts and omissions are prohibited, irrespective of fraud or honesty, on the ground of the tendency and temptation to evil which would otherwise result (*l*).

456. Being prepared to take liberties with the principles of sound terminology, to the extent of stigmatizing as fraudulent that which is not misrepresentation at all, it is not surprising to find that many equity lawyers have taken the same liberties with the word "fraud" as applied to misrepresentation in proceedings for rescission. Instead of merely stating that for the avoidance of a contract proof of a misrepresentation inducing it is sufficient, whether it was fraudulent or innocent, many equity judges have gone out of their way to say that the misrepresentation must be fraudulent, but that "in the eye of a court of equity"—a very favourite phrase—"fraudulent" means anything which misleads, whether

(*e*) See § 100 in Ch. V, Sect. 1, Sub-s. (2), *ante*.

(*f*) See § 101 in Ch. V, Sect. 1, Sub-s. (3), *ante*.

(*g*) See Lord Halsbury's *Laws of England*, title "Equity," vol. xiii, pp. 15-22, and see § 451, *sup.*, and the case cited in note (*f*) thereto.

(*h*) *Pearson v. Morgan* (1788), 2 Brown C. C. 388 (*per* BULLER, J., sitting in Chancery, at p. 389: "fraud is a question of law, and of fact. In cases where it is a question of fact, it is always considered a constructive fraud when the party knows the truth and conceals it"); *Traill v. Baring* (1864), 4 De G. & J. 318; *Brooke v. Lord Mostyn* (1865), 33 Beav. 437.

(*i*) Story's *Equity Jurisprudence*, vol. i, ch. vii, § 258.

(*k*) *Ibid.*

(*l*) See Sub-s. (5) of this Section, *post*.

fraudulent or not (*m*); and, in one case, it has even been suggested, as a possible justification for the use of the word in this connection, that any one who insists on the observance of a contract induced by a misrepresentation which was innocent when made, but which after it has been acted upon by the representee he discovered to have been untrue, is a fraudulent representor *ipso facto*, or, rather *ex post facto* (*n*)—a theory which would not only put subsequent discovery of falsity on the same plane as that contemporaneous knowledge which is admittedly essential to establish fraud, but would also turn every obstinate persistence in a hopeless claim or defence of any kind into a fraudulent act (*o*).

SECT. 4. THE DISTINCTION BETWEEN "LEGAL" AND "MORAL" FRAUD NECESSITATED BY THE ABOVE HISTORY.

457. It has been judicially declared in the strongest terms that "fraud" in law has always meant what it means in vernacular usage (*p*), and that any distinction between kinds of fraud, such as between "legal" and "moral" (*q*), or between fraud at law and equitable fraud (*r*), is impossible and senseless. It is submitted that these statements are quite inaccurate, and betray a certain lack of the historical sense. "Fraud," in the popular acceptance, has always had substantially one meaning. It can, therefore, only be true that "fraud" has always meant the same thing to the lawyer and the man in the street, if it has always been interpreted by the courts in one sense, and that, the popular sense. But, so far from this being the case, it would be more correct to say that the term has never had one and the same legal meaning even in any one period, much less in successive periods. This variety of concurrent, and successive, legal interpretations of a word which, in popular use, has all the time signified one idea only, was absolutely forced upon the law from the moment it appropriated a word from the common stock and dedicated the enclosure to improper uses. There are many dangers and inconveniences in using the language of the people for the purposes of scientific terminology, even when the popular meaning is carefully retained; but such a procedure is fatally misleading when a secondary or unnatural meaning is substituted for, or added to, the popular meaning, as has most undeniably been the case with regard to the words "deceit" and "fraud." It then becomes a matter of absolute necessity, if misconception is to be avoided, to explain, time after time, as often as the word is used, whether the primary,

(*m*) *Rawlins v. Wickham* (1858), 3 De G. & J. 304 (*per* TURNER, L.J., at pp. 316-318); *New Brunswick and Canada Railway and Land Co. v. Conybeare* (1862), 9 H. L. C. 711 (*per* Lord WESTBURY, L.C.: "to entitle a man to rescission the case alleged must be shown, according to the language of Lord ELDON, to amount to that which the Court of Equity holds to be fraud"); *A.-G. v. Ray* (1874), 9 Ch. App. 397 (*per* HALL, V.-C., at p. 405, who described the innocent misrepresentation which is enough for rescission as "what Lord ELDON would have considered as fraud, not in its offensive sense, but what the court considers as fraud," and treats "as if actual fraud"); and *Mathias v. Yettis* (1882), 46 L. T. 497 (*per* JESSEL, M.R., at p. 502).

(*n*) JESSEL, M.R., at pp. 12, 13 of *Redgrave v. Hurd* (1881), 20 C. D. 1, C. A., is responsible for this laborious and strained explanation. He there says that the theory on which innocent misrepresentation, as it would be called by ordinary people, renders the representor liable in rescission proceedings, may be put in two ways: "a man is not to be allowed to get a benefit from a statement which he now admits to be false"—which is a sound and intelligible proposition—and "the other way of putting it was this: even assuming that fraud must be shown in order to set aside a contract, you have it when a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. To do so is a moral delinquency," which, it is submitted, is a gross *petitio principii*.

(*o*) This strange doctrine, however, finds a place in Roman jurisprudence: see App. C, Sect. 2, Sub-s. (4), *post*.

(*p*) BOWEN, L.J., at p. 471 of *Angus v. Clifford*, [1891] 2 Ch. 449, C. A., and, again, at pp. 499-501 of *Le Lievre v. Gould*, [1893] 1 Q. B. 491, C. A.

(*q*) See note (*a*), *inf*.

(*r*) See note (*b*), *inf*.

or the secondary, meaning is intended, and, if the latter, what particular shade of conventional sense is being selected for the purposes of the occasion. Hence it is that judges have been compelled to discriminate, with painful precision, between "constructive" (s), "legal" (t), "technical" (u), "artificial" (x), "unconscious" (y), or "equitable" fraud (z) on the one hand, and

(s) See *Pearson v. Morgan*, cited in note (h), *sup.*, per BULLER, J., and *Parr v. Jewell* (1855), 1 K. & J. 671, per PAGE WOOD, V.-C., at pp. 673, 674, where "constructive fraud" is distinguished from "actual" and "positive" fraud.

(t) The expression "legal fraud" is said to have been introduced by Lord KENYON, C.J., at p. 103 of *Haycraft v. Creasy* (1801), 2 East, 92: "it was enough that . . . the defendant affirmed that to be true within his own knowledge which he did not know to be true. This is fraudulent; not perhaps in that sense which affixes the stain of moral turpitude in the mind of the party, but falling within the notion of 'legal fraud.'" The term, or such equivalent phrases as "fraud in law," "fraud in the legal acceptance of the term," and the like, is from this date constantly used, and, it is conceived, properly and aptly used, by both common law and equity judges, as, *e.g.*, by TINDAL, C.J., at pp. 107, 108, and BOSANQUET, J., at p. 109 of *Foster v. Charles*, No. 2 (1830), 7 Bing. 105; by TINDAL, C.J., again at p. 757 of *Wilson v. Butler* (1838), 4 Bing. (N. C.) 748, and at pp. 155, 156 of *Stone v. Compton* (1838), 5 Bing. (N. C.) 142 ("under circumstances which are deemed in law to amount to covin, for there is no suggestion whatever of any *intentional* fraud or misrepresentation on the part of the party *personally*"); by Lord ABINGER, C.B., at p. 156 of *Moens v. Heyworth* (1842), 10 M. & W. 147 (in this case PARKE, B., expresses the opinion, at pp. 157, 158, that "moral fraud" is always essential, but he recognizes that what is called "legal fraud," *sc.* a representation "without any deliberate intention to deceive" is not of so grave a character); by PARKE, B., who, though he was of the opinion just cited, and repeated by him at p. 415 of *Taylor v. Ashton* (1843), 11 M. & W. 401, yet at p. 541 of *Murray v. Mann* (1848), 2 Exch. 538, admitted that "the cases show a distinction between legal and moral fraud"; by Lord CAMPBELL, L.C., at p. 866 of *Denton v. Great Northern Railway Co.* (1856), 5 E. & B. 860 ("what the law calls a fraudulent misrepresentation"—*viz.*, in that case, a mere mistake in a timetable); by TURNER, L.J., at pp. 316-318 of *Rawlins v. Wickham* (1858), 3 De G. & J. 304 ("no moral, but legal fraud"); by Lord CAIRNS, L.C., at p. 242, of *Thomson v. Eastwood* (1877), 2 App. Cas. 215, H. L. (where he carefully puts in two different categories "personal" and "legal" fraud: this case is a very forcible illustration of the reality of the distinction, because the plaintiff made charges both of "personal" fraud, and of the fraud which equity imputes to unjustifiable conduct on the part of a trustee, and, at p. 242, Lord CAIRNS advised the House to dismiss, with costs, so much of the bill as alleged the former kind of fraud, and, further, as regards the residue, "to omit from the decree the word 'fraudulent'"); by JESSEL, M.R., at p. 502 of *Mathias v. Yetts* (1881), 46 L. T. 497, C. A.; by KEKEWICH, J., at p. 178 of *Re McCallum* (1901), 83 L. T. 717, C. A.; and by COZENS-HARDY, M.R., in *Mayhew v. Boyes* (1910), 100 L. T. 1, C. A. ("an agreement which the law declines to recognize as being against public policy, and in the eye of the law fraudulent, though not morally so").

(u) KNIGHT-BRUCE and TURNER, LL.JJ., in *Traill v. Baring* (1864), 4 De G. & J. 318, discriminate between "fraud in the technical sense," and "actual" fraud, and say that the former may exist without the latter.

(x) This was the expression of JEUNE, P., at p. 275 of *Oliver v. Hinton*, [1899] 2 Ch. 264, C. A., a case of "constructive notice," where, dealing with the view of JAMES, L.J., that conduct amounting to fraud must be shown in order to impute to a party such notice, he observes that "what he"—JAMES, L.J.—"meant was, not such conduct as would entitle a jury or a judge at common law to find that there had been *actual* fraud, but negligence so gross as would justify the Court of Chancery in concluding that there had been fraud in an *artificial* sense of the word."

(y) This very strange distinction between "conscious" and "unconscious" fraud seems to have been drawn by the Irish C. A. in *S. Pearson & Co., Ltd. v. Dublin Corporation*, [1907] A. C. 351, H. L., and is criticized, and entirely dissented from, by Lord ATKINSON, in the H. L., at pp. 364, 365. An "unconscious fraud" is as obvious and egregious a contradiction in terms as "a square circle."

(z) *New Brunswick and Canada Railway and Land Co. v. Conybeare* (1862), 9 H. L. C. 711 (per Lord WESTBURY, L.C., "what the Court of Equity holds to be fraud," which is enough for rescission); *Traill v. Baring*, *sup.* (per KNIGHT-BRUCE and TURNER, LL.JJ., "fraud in the eyes of this court"); *Brooke v. Lord Mostyn* (1865),

fraud in its normal and natural and ordinary sense, variously described as "actual," "positive," "personal," "moral," "intentional," "conscious," or "in the offensive sense," on the other; as if fraud could ever be described as other than actual, positive, personal, moral, intentional, and conscious, or could be used in any but an offensive sense, except for the purpose of the antithesis necessitated by the initial mistake in scientific terminology.

458. This error, however, having been made at the outset, the distinction between "legal" and "moral" fraud, and that between "equitable" fraud and both "legal" and "moral" fraud, are not only not deserving of the contemptuous criticism to which they have been subjected by Lord BRAMWELL, in the one case (*a*), and Lord ESHER, in the other (*b*), but, for reasons already indicated, have become absolute requirements of what one may call terminological honesty, and have acquired the character of something even more than the mere "convenience" which Sir JAMES HANNEN rightly, but inadequately, ascribed to them (*c*). If a man announces that for the purposes of a certain biological discussion he proposes to use the word "animal" invariably in its strict biological, and not in its popular sense, no harm is done, so long as he rigidly adheres to his announced intention; but, if in a science which involves human conduct, such as jurisprudence, ethics, or casuistry, he is found to be taking a term in common use, which has a definite meaning in that use, and applying to it at one time the ordinary sense, and, at another, a specific invented sense of his own,—above all, when the term in question carries with it to the non-scientific mind a moral stigma,—it is his plain duty to declare, on every occasion, whether the popular, or the artificial, meaning is intended. Therefore, when Lord BRAMWELL, who, though courteously dubbed a "great master of language" by Sir J. HANNEN (*d*), might, perhaps, more correctly be denominated a great slave of language, says that "legal fraud" has no more meaning than "legal heat," or "legal light," the criticism is as inept and ridiculous as it, at first sight, makes its subject to appear. Whenever judicial or parliamentary authority has "deemed" a thing to be, for certain purposes, what it is not for any other purpose, the absurdity and deceptiveness lies not in the calling the one "legal," and the other "actual," but in the omission to do so. For instance, to take Lord BRAMWELL'S own example, suppose that, for the purpose of a certain statute, "heat"

33 Beav. 437 (*per* TURNER, L.J.: "meaning by fraud, not moral fraud, but what in the eye of this court is considered as amounting to fraud"); *Ross v. Estates Investment Co.* (1868), 3 Ch. App. 682 (*per* Lord CAIRNS, L.C., at p. 687: "in the eye of the court a fraud upon the public"); and *A.-G. v. Ray* (1874), 9 Ch. App. 397 (*per* HALL, V.-C., in the court below, at p. 403 n.: "not as understood in its offensive sense, but what the court treats as fraud").

(*a*) At p. 243 of *Weir v. Bell* (1878), 3 Ex. D. 238, C. A. ("I do not understand legal fraud. To my mind it has no more meaning than legal heat or legal cold, legal light or legal shade"), and, again, at pp. 346 and 351 of *Derry v. Peek* (1889), 14 App. Cas. 337, H. L. (where he returns to the charge again, and expresses his disagreement with the view of Sir J. HANNEN, expressed in the C. A., whose decision was being reversed, that the expression was at least "a convenient one").

(*b*) At p. 498 of *Le Lievre v. Gould*, [1893] 1 Q. B. 491, C. A.

(*c*) At p. 582 of *Peek v. Derry* (1887), 37 C. D. 541, C. A., where he criticizes the view expressed by Lord BRAMWELL in *Weir v. Bell*, *sup.*, in a passage which, in its turn, is criticized by Lord BRAMWELL in the H. L., as stated in note (*a*), *sup.* This passage is: "reliance has been placed upon some observations by Lord BRAMWELL, expressed in his usual striking manner, and certainly I am very unwilling to enter into discussion with so great a master of language as Lord BRAMWELL. But I must venture to express my opinion that this expression 'legal fraud,' which has been in constant use by judges for very many years, is, to say the least, an exceedingly convenient expression; that is to say, it is an expression which very clearly conveys an idea, which is the object of language, and it appears to mean this: that degree of moral culpability in the statement of an untruth to induce another to alter his position, to which the law attaches responsibility. . . . The word 'fraud' is, in common parlance, reserved for actions of great turpitude, but the law applies it to lesser breaches of moral duty."

(*d*) See the passage cited in the last note.

were to be defined as a temperature of so many degrees Fahrenheit, a temperature which by most people would be considered only luke-warm or tepid, or "legal cold" as a temperature which by ordinary persons would be considered to constitute heat, or suppose "light" and "dark" to be defined by Act of Parliament (as indeed it has been, in statutes requiring lamps of vehicles to be lighted at certain hours), there would be nothing ridiculous in describing the statutory temperature as "legal heat" or "legal cold," respectively, or the statutory limits as defining "legal light," and everything ridiculous in describing it otherwise. Again, if equity in fact, however unnecessarily, has chosen to call the mere breach of a duty of disclosure, or a mere innocent misrepresentation (for purposes of rescission), "a fraud in the eye of this court" (e), it is almost perverse to assert, as Lord ESHER does (f), that "equitable fraud" is the same as "legal fraud," or that there is no necessity for distinguishing them. No doubt, fraud *ought to mean* in equity what it means in law, and, in both, what it means to men of the world; and, if this were so, there would be no necessity for the distinction. But when it is said that this identity of meaning exists, and has always existed in fact, it is impossible to argue against such a proposition; one can only deny it *simpliciter*, and appeal to the history of our law, and to the common sense and knowledge of mankind, in support of that denial.

459. The fact, which cannot be gainsaid, is that there not only has been in times past, but is still, a real difference between the fraud which is deemed such in law, and the fraud which is accounted such by the normal intelligence of mankind, and that the former, as applied to misrepresentation (with which alone the present discussion is concerned), includes many statements which the plain man would deem, though reprehensible on other grounds, not fraudulent. It may be seriously doubted whether the average man would designate as fraudulent a statement made without belief in its truth, but with no knowledge or belief in its falsity, which is undoubtedly fraudulent in law (g). But it is certain that the plain man would never impute fraud to the personally blameless principal of a fraudulent agent, or to one who represents what is in fact false, but not known to him to be so, without any intention of injuring the representee, or any one else, or benefiting himself or his friend, or without any assignable motive whatever, as, for instance, a statement made as a "practical joke," or from mere diablerie and mischievousness, or, to take a hypothetical case put by Lord BLACKBURN, with the motive of benefiting the representee. And yet all these types of misrepresentation are in law "fraudulent" (h). That there is this discrepancy between the artificial nomenclature of the courts and the ordinary sense of the community was recognized not only by Sir J. HANNEN, who was a party to the decision of *Derry v. Peek* in the Court of Appeal (i), but even by Lord HERSHELL in the House of Lords when reversing that decision (k). The discrepancy is also reflected

(e) See note (z), *sup.*

(f) See note (b), *sup.*

(g) See Ch. V, Sect. 1, Sub-s. (2), *ante*. Surely it is questionable whether the average member of society would subscribe to the uncompromising statement of Lord BRAMWELL at p. 350 of *Derry v. Peek*, *sup.*, that "a man who makes a statement without care or regard for its truth or falsity commits a fraud: he is a rogue"; or that of Lord ESHER, M.R., who did "not hesitate to say that a man who thus acts *must* have a wicked mind"; or that of BOWEN, L.J., who said that such "wicked indifference" constitutes "the fraud" as much as "the knowledge of the falsehood" would (at pp. 498, and 501, respectively, of *Le Lievre v. Gould*, *sup.*); and whether he would not rather consider it a case of that "careless handling of the truth," which the costermonger, with such discrimination and courtesy, imputed to the constable whom he declined to charge with perjury.

(h) See Ch. VIII, Sect. 1, Sub-s. (4), *ante*, as to the fraud imputed to the principal, and Ch. V, Sect. 1, Sub-s. (3), § 102, *ante*, and the three cases cited in notes (l), (m), and (n) thereto, as to the other examples.

(i) See note (c), *sup.*

(k) At p. 365 of *Derry v. Peek*, *sup.*: "the popular use of the word perhaps involves generally the conception of such a motive as one of its elements," the motive referred

in the deliverances of juries, who by their answers to questions put to them, when the questions gave them any opportunity, or by the riders appended to their verdicts, have, from time to time, expressed (impliedly, but all the more significantly on that account) their repugnance to accept the judicial definition of fraud, whilst at the same time manifesting their readiness to act upon the judicial enunciation of the limits of civil responsibility (*l*). Further, the judges, and amongst them Lord BRAMWELL himself (*m*), have lost no opportunity of contrasting and distinguishing frauds created by the legislature, where there may be no actual dishonesty, from other frauds, and have expressed in no doubtful language their extreme aversion to the task imposed upon them by Parliament of giving effect to these "statutory fictions," and have refused to do so without at the same time emphasizing the vital importance of making the distinction clear (*n*). Then why, it may be asked, if statutory fictions of

to being "a desire to defraud or injure the person to whom the representation was made," or at least a motive of either "gain to the person making the assertion," or "injury to the person to whom it is made." Lord HERSCHELL'S conclusion, at p. 374,— "if fraud be proved, the motive of the person guilty of it is immaterial,"—must seem an astounding contradiction in terms to any one not accustomed to use "fraud" in a wholly unnatural sense.

(*l*) Thus, in *Foster v. Charles*, No. 2 (1830), 7 Bing. 105, the jury appended the following rider to their verdict: "we consider that there was no *actual fraud* on the part of the defendant, and that he had no fraudulent intention, although what he has done constituted a fraud in the legal acceptance of the term"; in *Brown v. Edgington* (1841), 2 M. & G. 279, the jury "returned their verdict for the plaintiff . . . but negatived any 'guilty knowledge' (as they termed it) on the part of the defendant" (p. 283); in *Taylor v. Ashton* (1843), 11 M. & W. 401, the jury adopted the converse course of finding for the defendants, but adding that "they had been guilty of gross and unpardonable negligence in publishing the report"; in *Milne v. Marwood* (1855), 15 C. B. 778, the jury, in finding for the plaintiff, made haste to add (p. 780): "but we acquit the defendant of any fraudulent intention"; in *Ludgater v. Love* (1881), 44 L. T. 694, the verdict was that "the son knew that the sheep had rot, but there was not enough evidence to say it was fraudulently done," which of course was held to be a finding of "fraud in law," though the jury did not consider it moral, or actual, fraud; and in *Joel v. Law Union and Crown Insurance Co.*, [1908] 2 K. B. 863, C. A., the jury, in answer to a question, whether the deceased had fraudulently concealed a certain fact from the defendants, found that "she foolishly, but not fraudulently concealed this fact," which answer, whatever it meant—and the C. A. considered it to be so ambiguous as to justify an order for a new trial—at least implied a strong probability that the jury hesitated to regard as fraud that which they were conscious that the law did so regard.

(*m*) See the next note.

(*n*) MELLISH, Q.C.—afterwards MELLISH, L.J.—in his argument at pp. 608, 609 of *Re Overend, Gurney, & Co., Ex parte Oakes and Peck* (1867), L. R. 3 Eq. 576, says truly that "there are certain statutes . . . which make things fraudulent which may be most innocent things in the eyes of the world. As, for instance, under the statute of Elizabeth against fraudulent conveyances, a man may have made a conveyance without consideration, and yet under that statute it would be held to be fraudulent against a subsequent conveyance for value . . . It is a misfortune that the word 'fraud' has ever been applied to transactions which do not involve any moral fraud at all." It is curious that this was the very case which is supposed to have occasioned the introduction of sect. 38 of the Companies Act, 1867, a few months later in the same year,—the enactment (now happily repealed) which affords the most glaring example of the "misfortune" alluded to in the above argument, and which, had it been in force at the time, would have added emphasis to the observations there made. This section has been condemned more than once for the odious compulsion it put upon the interpreters of the law to "deem fraudulent" an omission from a prospectus which might have been perfectly innocent. The judicial attitude towards this and all other statute-made frauds, which are even more repulsive than judge-made frauds, is expressed with admirable force and lucidity by VAUGHAN WILLIAMS, L.J., at p. 471 of *Cockett v. Keswick*, [1902] 2 Ch. 456, C. A. "I think," he there says, "that the 38th section, which in effect provides that a man . . . shall although acting honestly be deemed fraudulent, is a section which no judge can give effect to, not only without a feeling of repugnance, but without a feeling that that which he is

fraud are properly distinguished from actual fraud, is criticism of an adverse, and even contemptuous, character passed upon those who, with no less propriety, have discriminated between judicial fictions of fraud, and actual fraud? Why is this "divorce between the tongue and the heart" (o) to be condemned in the one case and ignored in the other?

SECT. 5. CRITICISM OF THE EXISTING LAW OF MISREPRESENTATION.

460. There is very little, either in the form or the substance of the English law of misrepresentation, which one would desire to see amended, with two exceptions, upon which it is proposed now to offer some observations. The first raises a question of terminology; the second, a question of principle. The former, however (as will be seen, and as, indeed, has already been illustrated in some degree) incidentally, and in its consequences, is of quite as much importance as the latter.

Sub-sect. (1). Terminology. Inutility and Inconvenience of the Term "Fraud" as applied to Actionable Misrepresentation.

461. "All human Spirit and Reason does yet what Father Adam began life by doing; strive to name the new Things it sees of Nature's producing,—often helplessly enough" (p). The importance of terminology in any department of knowledge which ranks as a science, above all in such a science as jurisprudence (q), one would suppose to be manifest. And yet, in nearly every branch of

doing does not really tend to the maintenance of commercial honesty and commercial morality. To herd together, under a collective word like 'fraudulent,' people who are honest and people who are dishonest, to my mind, cannot possibly tend to the maintenance of commercial morality." And, in the same case, FARWELL, J., in the court below, had (at p. 463) observed that "the Act not only makes non-disclosure a cause of action, but makes it a cause of action based on fraud not proved to exist, but deemed to exist as a statutory fiction for the purpose of supporting the action." Cp., on the "painful duty" thrust upon the court by this enactment, the observations of COZENS-HARDY, L.J., at pp. 628, 629, and ROMER, L.J., at p. 624 of *Broome v. Speak*, [1903] 1 Ch. 586, C. A., which are concurred in and adopted by LORD HALSBURY, L.C., at p. 345, and LORD LINDLEY at p. 346, of the same case, on appeal to the House of Lords, *sub nom. Shephard v. Broome*, [1904] A. C. 342, H. L. Another enactment of the same description, which provoked the like criticism was that which is set out in § 399, *sup.*,—sect. 35 of the Stannaries Act, 1869—providing that a transfer of shares to certain persons, and under certain conditions, "shall be presumed to be a fraudulent transfer," with reference to which BRAMWELL, L.J., at pp. 19, 20 of *Re Wheal Unity Wood Mining Co.* (1880), 15 C. D. 13, C. A., was moved to "say in passing that this is a most unfortunate expression, because it is quite certain that a transaction within the meaning of the clause may be a perfectly *bona fide* and honest one; for instance, a man may think he is making a handsome present of a share to a servant, nevertheless it is to be deemed a fraudulent transaction." It is to be noted that the above criticism is wholly inapplicable to two classes of enactment in which the word "fraud" is used: (1) where the term is applied to that which is already fraudulent at common law, as in sect. 58 of the Sale of Goods Act, 1893, and in the bankruptcy statutes relating to fraudulent preference, and, perhaps, the statutes of Elizabeth against fraudulent conveyances, and (2) where there is no "deeming" or "presuming," but certain consequences are made to attach to representations or acts described as fraudulent, or "in fraud of" a person's "rights," etc., in which cases "fraud" is construed to include no more than what, *strictissimo sensu*, it would include at common law: see *Re Avery's Patent* (1887), 36 C. D. 307, C. A., *per STIRLING, J.*, at p. 319, and BOWEN, L.J., at p. 325 ("it would be monstrous to apply the same reasoning"—*sc.* the equitable reasoning as to the liability of an agent to his principal for non-disclosure, however innocent his motives—"to the clear words of the statute"); and *Re Ralston's Patent* (1909), 100 L. T. 386 (WARRINGTON, J.).

(o) The expression of Roger Ascham in a passage cited in § 461, *inf.*

(p) Carlyle's *French Revolution*, Book V, Ch. I.

(q) See the citation from Phillips in § 466, *inf.*

English law, precision and lucidity in nomenclature, as well as in classification and formal expression generally, has been either openly professed to be, or in practice treated as, a thing of no account, or, at any rate, of quite subsidiary interest. If it may be permitted to repeat here what the author has said in another connection (*r*), "it is an old fallacy, exposed again and again by accurate thinkers, but still flourishing like a green bay tree in the English mind, that things and thoughts are the realities, and that names do not matter. The truth is that terminology reacts on thought. Loose definitions encourage loose conceptions. Words, maxims, aphorisms, phrases, which are good servants, but bad masters, have a tendency to dominate ideas, and, when once this perverted and unnatural sovereignty is established, there is danger of a Saturnalian orgy in which Mind, the Master, will wait upon Language, the Slave. It is true of scientific, as of artistic, naming that *φῶς ἴδιον τοῦ νοῦ τὰ καλὰ ὀνόματα* (Long. *De Subl.*). And equally true is it that, from this point of view, it is impossible to ignore the 'practical' evils and perils of false terminology. The wise Roger Ascham warns his readers of these in his 'Scholmaster.' . . . ye know not what hurt ye do to learning, that care not for wordes, but for matter, and so make a *devorse between the tong and the hart*," which 'devorse,' he adds, 'in all ages, first in philosophies, and again in Religion,' has caused '*right judgment of all things to be perverted.*' So Bacon (*Nov. Org.* lix) describes 'the Idols of the Marketplace' as 'the most troublesome of all; idols which have crept into the understanding through the alliance of words and names. For men believe that their reason governs words, but it is also true that words react upon the understanding'; and again (*De Augm. Scient.* Book V) he emphasizes this truth: 'the juggleries and charming of words will in many ways *seduce and forcibly disturb the judgment*, and (after the manner of the Tartar bowmen) shoot back at the understanding from which they proceeded.'"

462. The violation of the first law of scientific terminology, viz. that each term should express a distinct concept, and one only, and should always be used in one and the same sense, has been conspicuously violated in the judicial maltreatment of that unhappy expression "fraud." No doubt the science of jurisprudence, since it involves an application of logic and ethics to the common affairs and daily transactions of life, is forced to draw largely upon the popular vocabulary for purpose of expression. It is also true that this course, in any science, has some conveniences, but it is always subject to far greater inconveniences and perils, the two principal of which, as pointed out by Dr. Whewell (*s*), are that the laxity of the *vulgaris eloquium* may infect the terminological apparatus of the science, and that vernacular expressions are usually tinged with sentiment, emotion, imagination, and other subtly pervading personal elements. Consequently, it is unwise in any science to father a current expression for the purposes of any proposition, if it is possible to state that proposition clearly and fully without resource to the expression at all. But, if the expression be adopted, it is before all things necessary that the position which it is to occupy in its adoptive home should be exactly defined, and afterwards strictly adhered to. Both these rules, or counsels of prudence, have been disregarded in the case of the word "fraud."

463. In the first place, it was from the outset wholly unnecessary to use the word at all for the purpose of the civil law of misrepresentation. The law has chosen to say that every misrepresentation which the representor did not in fact honestly believe to be true, is to be called "fraudulent," and, then, that a fraudulent misrepresentation is actionable. But what necessity was there for the introduction of this middle term at all? "Whenever it is said," observes Professor Holmes (*t*), "that a certain thing is essential to liability, but it is

(*r*) App. XXI, Sect. 2, of the author's *Code of the Law of Actionable Defamation*. In this department of the law the instances of loose and misleading terminology are much more numerous and grave than in the case of misrepresentation, or, indeed, any other branch of English law.

(*s*) In his *Novum Organum Renovatum*, Book IV ("Of the Language of Science").

(*t*) *The Common Law*, Lecturc IV (Fraud, Malice, and Intent), at p. 134.

conclusively presumed from something else, there is always ground for suspicion that the essential is to be found in that something, of what is said to be presumed." So it is with fraud; the essential thing is that the misrepresentation should have been made without a belief in its truth; from this fact alone, if proved, the existence of a fraudulent intent, whether there was such an intent or not, is instantly and irrebuttably presumed. What is this but to confess that the essential thing is the non-belief, and that "fraud" is a mere unnecessary label? One need not, however, resort to implied confessions; there are judicial declarations in express terms to be found in abundance throughout the reports, beginning at a date earlier even than *Pasley v. Freeman* (u), that a good cause of action for damages would be disclosed by a declaration or statement of claim in which the word "fraud" does not appear at all, provided that the "essential thing"—viz. the *scienter* (enlarged in modern times to cover non-belief of the truth)—does appear (x).

464. Secondly, the use of this unfortunate expression lacks the positive, as well as the negative, merit of Shylock's "harmless necessary cat." It has proved as misleading in its history, as it was unnecessary in its origin. Being a term, above all others, "tinged with sentiment," in Whewell's phrase, or a "question-begging name," in Bentham's, and suffused, as it is, with inevitable suggestions of moral reprobation and odium, "fraud," if applied at all to questions of civil responsibility for damage caused by misrepresentation, should at least have been confined, at whatever cost of involved qualifications in stating the necessary propositions of law, to its popular signification. And yet, as has been seen (y), this is exactly what has not been done, and the common law has been as guilty in general, as the legislature has been on a few occasions (z), of the terminological crime of branding with one common "note of infamy" actions and persons which the common conscience would, and those which they would not, designate as dishonest, notwithstanding that, in all other connections, judges have never wearied in denouncing the enormity of making such "a terrible charge" of fraud without adequate grounds (a); and have refused to allow an action to be founded on it without the fullest particulars (b), or to countenance amendments and adjournments with the view of enabling a party to raise it at a late stage in the proceedings (c), and have punished heavily (with costs and otherwise) unnecessary and unproved suggestions of it by a party who is otherwise successful in obtaining relief (d). Failing a statement of the rule of law without using the word at all, in

(u) (1789), 3 Term. Rep. 51 (*per* BULLER, J., at p. 60: "the cases which I have stated . . . prove that the declaration states more than is necessary; for *fraudulenter* without *sciens*, or *sciens* without *fraudulenter*, would be sufficient to support the action"; so Lord KENYON, C.J., at p. 65: "several of the words stated in this declaration, and particularly *fraudulenter*, did not occur in several of the cases cited").

(x) *Behn v. Kemble* (1859), 7 C. B. (N. S.) 260 (where a count in the declaration was held bad, because it did not allege either the name (*fraudulenter*), or the thing (*scienter*), implying that an averment of the latter alone would have been sufficient: *per* CUR. at p. 267); *Thomson v. Eastwood* (1877), 2 App. Cas. 215, H. L., where though the facts disclosed "fraud in law," Lord CAIRNS, L.C., advised the House to omit the word from the proposed order, which he could not have done, if it were an essential ingredient in the cause of action); and *Davy v. Garrett* (1878), 7 C. D. 473, C. A., *per* THESIGER, L.J., in the passage, at p. 489, which is cited in note (p) to § 429, *ante*.

(y) See Sect. 4, *ante*.

(z) See § 459, *sup*.

(a) "A charge of fraud is such a terrible thing to bring against a man," said Lord ESHER, M.R., who always expressed himself very strongly on this subject, at p. 498 of *Le Lievre v. Gould*, [1893] 1 Q. B. 491. We learn from Com. Dig. Action on the Case for a Deceit, E. 5, that deceit did not then lie where any other form of action was available. So, in Roman law, the *actio doli mali* did not lie, where any other *actio* was possible, because proof of *dolus* involved *infamia*, and, for the same reason, the Prætor would frequently mould the formula, or statement of the issues, *in factum*, so as to avoid the use of the term: see App. C, Sect. 2, Sub-s. (15).

(b) See Ch. XV, Sect. 2, Sub-s. (1), *ante*.

(c) *Ibid.*, Sect. 2, Sub-s. (2), *ante*.

(d) *Ibid.*, Sect. 2, Sub-s. (3), *ante*.

the manner above suggested, the only proper course would have been to state that "a misrepresentation made *either* (1) fraudulently, *or* (2) without a belief in the truth of the facts misrepresented, whether fraudulently or not, is the subject of an action for damages"; and, if stated in this form, the needless reduplication of language would at once have exposed itself in its naked absurdity, and the words "either fraudulently, or" and "whether fraudulently or not" must have been dropped as unmeaning surplusage.

465. It is submitted, therefore, that all the observations made in reference to the needless and mischievous use of the word "fraud" by the legislature (*e*), apply with tenfold force to the like needless and mischievous use of it by the judicature, in proportion as the infected area in the latter case extends beyond the restricted limits within which a merely statutory fiction can operate; and, further, that the criticisms of Lord BRAMWELL, and other high authorities, which, as directed against the judicial discrimination between "legal" and "moral fraud," are (as has been indicated) entirely out of place (*f*), are eminently proper and sound, if, and in so far as, they may be taken to apply to an earlier stage in the terminological process, viz. the initial misuse of the word which forced upon the judges the corrective and elucidatory distinction (*g*). It may be said that there has never been any judicial definition of fraud, and therefore there cannot have been any false definition of it,—which is true, since judges for obvious reasons have been unwilling, though it may be doubtful whether, as they have sometimes said, they were unable, to circumscribe a thing so Protean within the limits of a formula (*h*). But the havoc done is by the actual misapplication of the term to concrete cases: for every individual application of a name presupposes and involves an underlying description, if not a definition; and any infirmity in such an assumed basis is infinitely more mischievous, because more insidious, than any falsity in a definition which is plain for all to see.

466. It is perhaps too late in the day to expect, however desirable it may be, that the appellate tribunals of the land may in some case yet to be decided immortalize themselves by boldly discarding the word in question, and proclaiming its futility, just as the Court of Appeal in a celebrated judgment of recent times had the courage to reject the expression "special damage," as applied to actions of defamation (*i*), and as still more recently Lord LINDLEY,

(*e*) See § 459, and note (*n*) thereto, *sup*.

(*f*) See § 458, *sup*.

(*g*) Thus, BRAMWELL, L.J., at p. 243 of *Weir v. Bell* (1878), 3 Ex. D. 238, C. A., after insisting that, in every case, it is necessary, on the one hand, and sufficient, on the other, for the plaintiff to show "some duty and correlative right, and some violation of that duty and right," proceeds, by way of criticism of the term "legal fraud":—"where these exist, it is much better that they should be stated and acted on, than that recourse should be had to a phrase illogical and unmeaning with the consequent uncertainty." These observations would have been most just and valuable, if they had concluded with some such expression as—"than that recourse should be had to a word selected from the popular vocabulary, and that this word should then be used in another and an artificial sense, as well as the popular sense, thereby necessitating the introduction of a phrase which has no significance in it, except for the purpose of correcting the consequences of an error what never should have been made in the first instance."

(*h*) It has been said that fraud is so multiform that it cannot be defined at all. But this is not quite correct, though it must be admitted that the definition would have to be in terms as general as the thing defined, and so might be open to the reproach of a *circulus in definiendo*, as is the Roman jurists' definition of *dolus* (see App. C, Sect. 1, *post*), or to a criticism like that of Dr. Johnson's on Pope's lines: "Let observation with extensive view, Survey mankind from China to Peru," which, it was objected, meant no more than, "let observation with extensive observation observe mankind extensively." But the refusal to define, supposing definition to be possible, was based on a sound judicial instinct. The *dolus bonus* of jurisprudence must *versari in generalibus* with as much wariness and wiliness as the *dolus malus* which it seeks to enmesh.

(*i*) In *Ratcliffe v. Evans*, [1892] 2 Q. B. 524, C. A. At p. 529 of the judgment of

in a case of wrongful procuring of a breach of contract, deliberately omitted from his judgment the word "malice" (*k*), that "unhappy expression" to which, in another case of the like nature, Lord MACNAGHTEN doubted whether he could any longer affix an intelligible meaning (*l*). The nearest approach to such a rejection is the masculine and solid judgment of Lord ESHER, M.R., in a case of "imputed notice" (*m*). The question there debated was whether a policy of marine insurance is vitiated by concealment of material facts on the part of a broker employed by the assured to effect an insurance, not being the broker through whom the insurance was ultimately effected, and the assured being personally innocent of fraud. For the purposes of the discussion, Lord ESHER closely examined and contrasted the conflicting views of two opposite schools of thought as to the juridical nature and quality—there was no dispute as to the effect—of non-disclosure in contracts of insurance, the one school maintaining that fraud is necessary to avoid the contract, but that non-disclosure, whether with knowledge or not, and whether honest or not, is presumed in law to constitute fraud; and the other holding that there is no such presumption, that the use of the word "fraud" in such a connection is not only unnecessary but inexact and improper, and that the rule can be correctly and adequately stated without resort to the term at all, or at all events without applying to it a meaning which it does not bear. As might be expected from his well-known attitude towards legal presumptions of fraud, malice, intention, and the like, and other such "figures of speech" and "oracular phrases," Lord ESHER pronounces a strong condemnation of the former, and a warm approval of the latter view, citing at length the passage in Phillips which criticizes the doctrine expressed in Arnould's work, and of which the part which concerns the present discussion runs as follows: "since a representation through mistake and inadvertence has the same effect, in reference to the underwriter, as an intentional or literally fraudulent concealment . . . he" (Mr. Arnould) "deems it to be excusable to apply the term 'fraud.' . . . But I cannot think that the anomalous use of the term is justifiable on this ground, since ambiguous phraseology is not to be tolerated in any science, and least of all in that of law, where it can possibly be avoided, as it may easily be in this case by stating the practical doctrine in direct terms" (*n*). Lord ESHER, after the citation, says, "this seems to me to be the true doctrine" (*o*). And every word of this admirably expressed reasoning is, *mutatis mutandis*, applicable to the present subject of discussion.

467. In the law relating to defamation, the history and evolution of the terms "malice," and "malice in law," has been exactly analogous to that of "fraud" and "legal fraud" in the law of misrepresentation. Instead of declaring in direct terms that the publication of defamatory matter is actionable, the law has preferred to bisect this single and plain proposition, and solemnly pronounce, in the form of a pair of propositions, that it is malice which renders defamation

the court, delivered by BOWEN, L.J., after pointing out at least three different meanings, in different contexts, of "special damage," it is promised (at p. 529)—and the promise is kept—"that in this judgment we shall endeavour to avoid a term which tends to encourage confusion in thought."

(*k*) *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C. 239, H. L., at p. 255: "I have purposely abstained from using the word malice . . . it conduces to clearness in discussing such cases as these to drop the word malice altogether, and to substitute for it the meaning which is really intended to be conveyed by it"—in other words, to substitute for the name, which is a mere name, the constitutive element in the cause of action, which is the "essential thing."

(*l*) At pp. 143, 144 of *Allen v. Flood*, [1898] A. C. 1, H. L.: "I am not sure that I know what they"—the jury—"meant by the word 'maliciously': sometimes, indeed, I rather doubt whether I quite understand that unhappy expression myself."

(*m*) *Blackburn, Low, & Co. v. Vigors* (1886), 17 Q. B. D. 552, C. A. The dissentient judgment of Lord ESHER, M.R., was supported in the H. L., and the opinion of the majority dissented from: (1887), 12 App. Cas. 531, H. L.

(*n*) At p. 562 (in the C. A.) of the case last cited.

(*o*) *Ibid.*

primâ facie actionable, but that this malice is immediately and irrebuttably presumed from the mere fact of publication (*p*). Afterwards, on the gradual development of various affirmative defences to such actions, many of which it was thought right to make defeasible on proof of actual malice, the law was confronted with the fact that, in the two classes of case, it was applying two totally different meanings to the same word; and, thereupon, instead of abandoning the first meaning altogether, it proceeded laboriously to distinguish between "malice in law" and "malice in fact," just as, by a like process, and inspired by a like horror of burying out of sight a dead word which has once been adopted, however great a source of danger and corruption it may have become, the law has been forced to bisect "fraud" into "legal" and "moral" (*q*).

468. If it is too late in the day to abolish the expression "fraud," it will appear still more hopeless and revolutionary to suggest the abandonment of the word "false" in connection with representation. But, however audacious the suggestion may seem at first sight, there can be no doubt that this term is, like "fraud," though of course not nearly in the same degree, tinged with moral suggestion; that is to say, it is *ancipitis sensus*, to the extent that it may at one time bear a personal, at another an impersonal, connotation, whilst more frequently it imports a compound of both ideas. "True" and "truth" may, as "fraud" and "malice" must, point to a moral standard. "Telling the truth" is a phrase suggestive rather of a commendable moral quality than of mere scientific accuracy; and "a falsehood" suggests a lie rather than mere discrepancy with fact. This view is supported by a reference to the etymology of the expressions, as well by an appeal to current usage. "Truth" is strictly, belief or faith; "'true,'" says Horne Tooke, "as we now write it, or 'trew,' as it was formerly written, means simply and merely that which is troved"; and its variants and congeners, "troth" ("I plight thee my troth"), "truce," and "trust," all import good faith on the one side and confidence on the other,—a relation between two persons, who, in a literal sense, may be described as trustee and *cestui que trust* (*r*). "Truth supposes mankind, for whom and by whom alone the word is formed, and to whom only it is applicable" (*s*). Not only do we speak of "a true man," "a true liege," "a true friend," "a true servant," and the like; but the phrases, "a true word," or "a true story," and similar expressions, though *primâ facie* of an impersonal character, import as often as not, veracity, and not, or not merely, verity. So the same *sensus subauditus* not infrequently accompanies the Latin *verus*, when used with reference to a thing, as it always does when applied to a person. No doubt, "true" is quite as frequently predicated of statements in which no element of personality is involved; such as mathematical or scientific truth, or (though often here too honesty is suggested) historical truth; and we speak of "true English," a translation "true to the original," a "true measure," a "true note," and the like; but the point is that in most cases there is no certainty in which of the two senses the word is intended, or whether it is not meant to carry both. And the same ambiguity attends its correlate and opposite. Certainly, "false," when applied to words and things, often connotes no more than discrepancy with the facts, which is all that in law it indicates (*t*), as in the case of such expressions as "false opinions, deductions,

(*p*) This is the subject of App. II of the author's *Law of Actionable Defamation*, where the term is suggested to have been the creation, first, of criminal, and then of civil, pleaders in proceedings for libel.

(*q*) See O. W. Holmes, *The Common Law*, Lect. IV, p. 138, who there expresses the same view of the needlessness of introducing the word "malice" as that which he entertains with respect to "fraud." "although the use of the phrase 'malice' points as usual to a moral standard, the rule that it is presumed upon proof of speaking certain words is equivalent to saying that the overt conduct by speaking these words may be actionable whether the consequences . . . were intended or not."

(*r*) Cp. the words of the homage sworn to the Sovereign on his Coronation: "earthly worship and faith and truth I will bear unto you."

(*s*) Horne Tooke, *Diversions of Purley*, Part II, Ch. V.

(*t*) See Ch. IV, Sect. 1, *ante*.

premisses," etc.; or a false step, or note; or a false concord, or quantity; or a false tooth, false hair, or a false floor to a room, or a false bottom to a vessel. But far more frequently the use of the word imputes bad faith, even when applied to a thing, as it undoubtedly does, when applied to a person (*u*). The word is derived from *fallere* (the Greek *σφάλλω*), which suggests deceiving or leading astray. And there is no question that an evil signification attaches to such phrases as "a false account," "a false key," "false metal," "a false bond," "false colours," "false fire," "false weights, measures, or scales" (*x*), and numerous other terms of this description. And "'falsehood,' without more," says the New Oxford Dictionary (*y*), "now almost always implies intentional falsity," and (leaning apparently to the view that a dictionary should be something which *emollit mores, nec sinit esse feros*,—a conception of lexicography which would have disgusted Dr. Johnson) the writer proceeds: "in modern English the sense 'mendacious' is so prominent that the word must often be avoided as discourteous in contexts when the etymological equivalent in other Teutonic languages . . . would be quite unobjectionable" (*z*).

469. It would appear, therefore, that there is some danger of "false representation" conveying to the ordinary mind a suggestion of dishonesty, though nothing is more certain than that in English law it is not deemed of itself to impute anything of the sort (*a*). In earlier times, indeed, even lawyers understood "falsity" as the equivalent of deceit (*b*); and, in recent years, it has been seriously argued that an "untrue statement" means a statement which is believed to be untrue, or, in other words, which is fraudulent (*c*); whilst, conversely, an acute judge has in one and the same sentence used the word "untruth" in both senses in a hopelessly confusing manner (*d*).

470. For these reasons it is suggested that a good and sufficient definition of the generic term "misrepresentation" might be framed which would exclude the word "false," just as that species of misrepresentation which is the subject

(*u*) For example, "a false prophet," "false to his country, his flag, his King," etc.; "a false witness," etc. The two opposites are combined in Shakespeare's, "to thine own self be true, And it must follow, as the night the day, Thou canst not then be false to any man"; and in Tennyson's, "faith unfaithful kept him falsely true." So in Roman literature, *falsus homo* was a *fallax homo*: "ambitio multos mortales falsos fieri subegit" (Sallust, *Catil.* 10. 5); "Phalaris licet impetret ut sis Falsus, et admoto dictet perjuria tauro" (Juv.); and "testes aut casu veri, aut malitiâ falsi fictique esse possunt" (Cic. *De Div.* 2. 11. 27).

(*x*) The use in trade of weights, measures, scales, etc., which are described as "false and unjust," is a criminal offence under the Weights and Measures Act, 1878, ss. 25-27. Cp. the *Lex Cornelia De Falsis* (see Dig. 48. 10), and the French crime of "faux."

(*y*) *Sub voc.*

(*z*) It is a matter of doubt and difficulty, on which the Speaker is still occasionally called upon to rule, whether, and in what circumstances and contexts, the word "false" is parliamentary or unparliamentary.

(*a*) See Ch. IV, Sect. 1, *ante*.

(*b*) See Com. Dig. Deceit, A. 8, where he includes "other falsity," after enumerating various examples, under the head of deceit.

(*c*) In *Drinegbier v. Wood*, [1899] 1 Ch. 393, C. A., this interpretation of "untrue statement" in the Directors' Liability Act, 1890, was contended for in argument. Needless to say, it did not prevail: but the C. A. considered it with urbane gravity.

(*d*) This was Lord BRAMWELL, who, at p. 352 of *Derry v. Peck* (1889), 14 App. Cas. 337, H. L. says: "it is a man's duty sometimes to tell an untruth," from which statement one would suppose that an intentional untruth was meant,—one which, but for the existence of a conflicting and higher duty, such as to save life, or prevent a crime, would be immoral, as the same authority had stated at p. 930 of *Cave v. Mills* (1862), 7 H. & N. 913. But he immediately proceeds to show that, after all, he is using the term in the other sense. "For example," he adds, when asked as to a servant's character, he must say what he believes is the truth, however he may have formed his opinion and however wrong it may be." This, from one whom Sir J. HANNEN described as "a great master of language," does not seem to exhibit such mastery at its best.

of an action for damages might in like manner be defined without resort to the word "fraudulent" (e).

Sub-sect. (2). Criticism of the Substance of the Law of Misrepresentation.

471. Excellent as are the substantive principles of the English law of misrepresentation as a whole, it is perhaps permissible to criticize, as defective and somewhat illogical, two rules obtaining in this department, one a rule of the common law, and the other statutory.

472. The common law rule to which exception is taken, on the ground of irrationality, is that which prescribes that, though rescission may be granted for any misrepresentation, whether innocent or fraudulent, no action will lie for damages unless fraud is established (f). It is difficult to discover any good reason, theoretical or practical, for this distinction. The theory and basis of *civil* relief is, ordinarily, though there are certain recognized exceptions (g), compensation to the party injured,—*reparatio damni*,—not punishment of the wrongdoer (h), whether by way of preventive or retaliatory justice, or penance in *salutem animæ*, or public odium and reprobation, which may be left to the criminal courts, the Church, the *forum conscientie*, or the moral sense of the community, as the case may be. In this province, the function of justice is, as Aristotle expresses it, *διορθωτικόν* (i); it aims at redressing, so far only as material interests are concerned, a balance which has been disturbed by, in its literal sense, iniquity. For this purpose it is immaterial whether the balance has been unduly weighted by craft or by accident; the object being, in the language of Demosthenes, cited in the first title of the Digest (dealing with the fundamental principles of jurisprudence), *ἐπανόρθωμα τῶν ἐκουσίων καὶ ἀκουσίων ἀμαρτημάτων* (k). Whether regard is had to this compensatory or restitutive nature of the relief granted by a civil court, or to the material interests of the person to whom the relief is to be granted, it is, from either point of view, wholly immaterial whether a misrepresentation was dishonest or honest. Rescission is one way of redressing the balance; compensation in money is another, and a less complete and satisfactory one. Both remedies are alike designed to put back the parties *in statu quo*,—specifically and exactly, in the one case; generally, and so far as money can do it, in the other. If an innocent misrepresentation entitles the representee to rescission, or the undoing of the past, which is the ideal remedy, why should it not *à fortiori* entitle him, at his option, to the less satisfactory and perfect remedy of recompensing him for the past? It is not as if a greater measure of damages were awarded for a fraudulent misrepresentation inducing a contract, than for an ordinary breach of contract; if this were so, there might be some force in the contention that there should be a corresponding distinction between fraudulent and innocent misrepresentation; but any such theory, as has been pointed out already (l), is unsupported by authority. Whether the cause of action be a wicked falsehood, or a mere breach of contract, if any damage at all be proved to have resulted, the quantum of that damage is assessed on precisely

(e) As thus: "misrepresentation is a representation which, when made, was not in substantial accordance with the material facts to which it related. Any misrepresentation which, when made, was not honestly believed to be in such accordance is the subject of an action for damages." It need hardly be said that the author has not considered the time ripe for the introduction of such an innovation into his suggested Code.

(f) See Ch. IX, Sects. 1, 2, and Ch. X, Sect. 1, *ante*.

(g) *E.g.* malice in defamation, assault, malicious prosecution, etc.

(h) See Bacon's *Maxims of the Law*, Reg. VI: "our law, when the injury is already executed and inflicted, thinketh it best satisfaction to the party grieved to relieve him in damages, and to give him rather profit than revenge."

(i) *Ethics*, ii. 113.

(k) Dig. 1. 3. 2, which is founded on Marcianus, who, in his *Instit. Lib. I*, cites the passage from Demosthenes.

(l) Sec § 238 in Ch. X, Sect. 3, *ante*.

the same basis (*m*); and, this being so, it is impossible to see why the victim of an innocent untruth should not be entitled to compensation, since he can get no greater damages than he would clearly be entitled to if the action were for a mere breach of warranty or contract.

473. Further, from the point of view of the representee, the injury to him is exactly the same, whatever the motive of the representor was. Why, therefore, is his remedy to be less extensive? "Neque enim interest emptoris," say the Roman jurists in reference to contracts of sale, "cur fallatur, ignorant venditoris, au calliditate" (*n*).

474. The second reform which may be suggested in relation to the law of misrepresentation has reference to statutory provisions. The effect of the Directors' Liability Act, 1890, as now reproduced, with slight modifications, in sect. 84 of the Companies (Consolidation) Act, 1908, has been considered in an earlier Chapter (*o*). This enactment, quite apart from its numerous defects in detail, and its looseness of expression (*p*), has seemed to many of those best qualified to speak on the subject (*q*), objectionable in principle. Indeed, a perusal of its contents, and the history of its introduction, and afterwards of its judicial interpretation, provoke the suggestion that either it ought never to have been passed at all, or that the legislature should have made it of general, and not limited application.

475. The Act of 1890 is a *privilegium* in the original sense of the word, that is, a statute directed against a particular individual or class (*r*), as well as a *privilegium* in the later sense of an Act conferring special favours on a particular individual or class. In respect of untrue statements in prospectuses of companies, it is a "privilege" in favour of the class of representees who take shares in such companies, and a "privilege" against the class of directors, and others who issue, or are by the statute deemed to have issued, the prospectus. In either sense of the term, such *privilegia* are odious, and require the strongest possible grounds to justify them (*s*). In the case of the Directors' Liability Act, 1890, there seems to be a "plentiful lack" of reasons for its introduction. Like all enactments passed *ad hoc* in a state of panic, to meet a sudden situation, or to serve as a sop to a popular (and, nearly always, irrational) clamour, this statute not only was of doubtful justice and policy in its origin and object, but was so framed as to defeat the purposes which the legislature had in view. The like unfavourable conditions attended the birth and subsequent career of the notorious sect. 38 of the Companies Act, 1867 (*t*), and of the Moneylenders Act, 1900 (*u*), and brought about, in the one case, extinction (*x*), and, in the other, a series of judicial

(*m*) Viz. that stated in §§ 228-237, *ante*.

(*n*) Dig. 21. 1. 1. 1.

(*o*) Ch. XIII, Sect. 1, *ante*.

(*p*) *Ibid.* See, particularly, §§ 354, 357, 359, 361, 363, 375, 381, 382.

(*q*) See Lord Lindley's observations on the enactment in his treatise on Companies.

(*r*) The XII Tables (Tab. 9) prohibited *privilegia* in this sense of the word, *privilegia ne irroganto*; see Cic. *Leg.* III, 19: "*in privos homines leges ferri noluerunt: id est enim privilegium: quo quid est injustius? quum legis hæc vis est ut sit scitum et jussum in omnes.*"

(*s*) As, for instance, a burden cast by the State on public occupations such as that of an innkeeper, in exchange for which a special lien is justly conferred; or a service rendered to the State, as *e.g.* by an author, who is properly given a limited monopoly as recompense.

(*t*) "The occasion of this Act must be remembered, viz. the omission from a prospectus of a company of a contract in the Overend and Gurney case which burdened the company": *per* BRAMWELL, L.J., at p. 499 of *Twyecross v. Grant*, No. 1 (1877), 2 C. P. D. 469, C. A.

(*u*) This was the outcome of *Gordon v. Street*, [1899] 2 Q. B. 641, C. A.

(*x*) Repealed by the Companies (Consolidation) Act, 1908, s. 286, and Sixth Schedule.

criticisms, "painful and frequent and free," which, if ridicule can kill, have resulted in at least semi-annihilation (*y*).

476. *Derry v. Peek* (*z*) was the father of the statute in question. The decision of the House of Lords in that case that a misrepresentation honestly believed to be true, though without any reasonable grounds for such belief, is not the subject of an action for damages, came as a shock to the moral sense of the community, and even fluttered the dovescotes of some exponents of the law. Now it was quite natural and proper that an amendment of the rule of law should be demanded; but, *more suo*, the popular critics, instead of attacking the principle, attacked the class of persons in whose favour the objectionable principle had been applied, and insisted that against them, and them only, the legislature should intervene; in other words, they clamoured for a *privilegium, quo quid est injustus?* (*a*). The consequence is that, instead of a measure being placed upon the statute book which would substitute a full and complete rule for a defective one, to be universally applied,—which was obviously the suggestion intended to be made by Lord HERSCHELL in a significant passage of his judgment in the case cited (*b*),—just such a piece of class or "exceptional" legislation as Lord BRAMWELL in the same case deprecated (*c*), was introduced, marking down as objects of special suspicion and treatment a particular body of men, and a particular kind of misrepresentation, for no other reason than that they had happened to be the subjects of the decision which provoked the discussion.

477. The above observations on the two rules—common law and statutory respectively—governing the existing law of misrepresentation, in their combined effect, lead to the suggestions that the common law rule should be altered by making mere misrepresentation, as such, the subject of a *primâ facie* right to relief, whether by way of damages or rescission: and that this *primâ facie* title to relief should, in both cases, be made defeasible on proof, and only on proof, by the representor, whoever he may be, that at all material dates he believed in fact, and on reasonable grounds, that the misrepresentation was true.

(*y*) See amongst other decisions, *Whiteman v. Sadler*, [1910] A. C. 514, H. L.

(*z*) (1889), 14 App. Cas. 337, H. L.

(*a*) See note (*r*), *sup*.

(*b*) At p. 376 of *Derry v. Peek*, *sup*.: "I think there is much to be said for the view that this moral duty ought to some extent to be converted into a legal obligation. . . . If it is to be done, the legislature must intervene, and expressly give a right of action in respect of such a breach of duty." Not a word here to suggest that the right of action should be given against a class.

(*c*) *Ibid.*, at p. 352: "the objection is to exceptional legislation, and the danger of driving respectable and responsible men from being promoters, and of substituting for them those who are neither."

APPENDIX B.

COMPARISON BETWEEN ENGLISH JURIDICAL AND ETHICAL
TREATMENT OF MISREPRESENTATION AND FRAUD.

478. In this Appendix it is proposed to consider the English law of misrepresentation in relation to, and in contrast with, (1) the current views and practices of the community, and (2) the ideals and teaching of philosophical and theological casuistry.

SECT. 1. ENGLISH LAW OF MISREPRESENTATION CONSIDERED IN RELATION
TO CURRENT MORALITY AND CUSTOM.

479. The English common law (in the sense of *lex non scripta*) defers to, and is built upon, and indeed, as the word "common" imports, *is* in a sense the custom of the community (a). For this reason, English judges have in times past expressed a passionate attachment to and admiration of the common law of the land, and a corresponding distrust and disparagement of its *lex scripta* (b); though it was occasionally thought decent to pay a purely formal deference to statutory law in the form of such grotesque theories as that of WILMOT, C.J., that "common law is nothing but statutes worn out by time; all our law," in his view (quite contrary to history) "beginning by consent of the legislature," and "whether it is law by usage or writing," he adds, "it is the same thing." He concludes, however, "I am not for giving any preference to either, but, if to either, I should be for giving it to the common law" (c). Custom, in all ages and countries, has not only regulated the business of life, but has determined the subsidiary and derivative rules of ethics (d), and constituted at least one of

(a) Among the *origines juris, mos et consuetudo* are mentioned in Dig. 1. 3. 32: "inveterata consuetudo pro lege non immerito custoditur, et hoc est jus quod dicitur moribus constitutum." All law being founded on consent, it matters not, whether that consent be expressed in written law, or *rebus ipsis et facto*. Consequently, law is unmade by *desuetudo* as effectually as it is made by *consuetudo*: "quare rectissime etiam illud acceptum est ut non solum suffragio legislatoris, sed etiam consensu per desuetudinem abrogentur" (*Ibid.*).

(b) *Maleverer v. Redshaw* (1670), 1 Mod. 35, where TWISDEN, J., at p. 36, says: "I have heard Lord Hobart say . . . that . . . the statute is like a tyrant . . . but the common law is like a nursing father." Exactly the same contrast between a statutory prescription (*κατὰ τύραννον καὶ δεσπότην τάξαντα καὶ ἀπειλήσαντα*) and a general principle of law (*ἐν πατρός τε καὶ μητρός στήθεσσι*), is drawn by Plato, *Legg.* IX, 859, and *Polit.* IV, 722, 723. The view of TWISDEN, J., is cited with approval by the court (*per WILMOT, C.J.*), in *Collins v. Blantern* (1766), 2 Wils. 341. So it is said of Coke that, whenever a friend, over a game of bowls, told him that he had a question of law to propound, he asked whether it was a point of common, or of statute law; adding, that, in the former case, he should be ashamed if he could not answer it,—in the latter, he should be ashamed if he could.

(c) *Collins v. Blantern*, *sup.*

(d) Not the primary, immutable, and elementary principles, which are antecedent to all experience, and unaffected by social conventions, as Kant, in his doctrine of the

the foundations of jurisprudence. Originally, indeed, as the etymology of "manners" and "mores" (*e*) indicates, custom and morality were regarded as practically indistinguishable from one another, and also, as is imported in the various senses of the word νόμος (*f*), from law.

480. Custom, then, being, whether for good or evil (*g*), "the principal Magistrate of Man's life (*h*), or, as Pascal puts it, *une seconde nature* (*i*), it follows that jurisprudence must mould, and undoubtedly English law within certain limits has moulded, its rules, and from time to time varied them, so as to give effect to the usages and requirements of contemporary society. What are these limits, beyond which the law refuses its conformity to current customs and practices? The answer is,—the "*certi fines Quos ultra citraque nequit consistere rectum*." In all those concerns of daily life where society has adopted conventions and rules of conduct which, however irrational or useless, in no way conflict with the elementary principles of morality, the law has been content to follow Custom. Here even *error facit jus*, if it be a case of error; for, where no principle is involved, it is better that law should enforce the tacit conditions, however foolish they may appear, subject to which mercantile transactions may be deemed to take place, than that it should introduce confusion by refusing to recognize them. To this extent, as "*homo est minister et interpretæ naturæ*," in the Baconian formula, so "*just est minister et interpretæ consuetudinis*"; and Justice, by waiting on Custom, wins acceptance and confidence from those with whom the custom originated. But where usage rebels against the primary rules of right and wrong, the common law has always set its face sternly and unflinchingly against it, however violently the trading community may resent this attitude, and however closely and impenetrably the "damned custom" may have "brassed" the public conscience "so, That it be proof and bulwark against sense." In such cases to apply the principle of *non nisi parendo vincitur*, justly applied to innocuous practices, would be an act of the basest treason; for Custom here is no longer the subject whose lawful wishes are to be respected, but the insurgent, whose pernicious attempts are to be frustrated and suppressed, and with whom no terms can be made.

481. It is a commonplace, both of ethical and of juridical philosophy, that fraud is manifold, and rectitude single (*k*); and that, whether as a consequence

Categorical Imperative, has most clearly established. These are the νόμοι ὑψίστους οὐρανίαν δι' αἰθέρα τεκνωθέντες, ὧν Ὀλύμπιος πατὴρ μόνος, οὐδὲ νιν θανάτῳ φύσις ἀνέρων ἔτικτεν, οὐδὲ μήποτε λάθῃ κατακοιμάσῃ, the subject of the famous chorus in the *Antigone* (865, *et seq.*), and again (455, 456), οὐ γὰρ τι νῦν γε κἀχθές, ἀλλ' αἰεὶ ποτε ζῇ ταῦτα, κοῦδὲς οἶδεν ἐξ ὅρου φάνη,—of which, in Platonic phrase, the eternal παράδειγμα ἀνάκειται ἐν οὐρανῷ (Plat. *Rep.*).

(*e*) "Manners," in old English, meant "morals" (as in the motto of William of Wykeham's "twins of learning,"—"manners makyth man"). So "mores,"—the root-word of morality,—meant originally nothing but customs, ways, practices: and "mos" at all times meant no more. See the citation from the Digest in note (*a*), *sup.*

(*f*) This term has in all periods of Greek literature borne these three senses—viz. (1) custom; (2) a moral law, whether built on custom, or independent of it, and superior to it, such as the ὑψίστους νόμοι referred to by Sophocles, as cited in note (*d*) *sup.*; and (3) a statute, decree, or ordinance.

(*g*) For good, on the whole, as most people believe; for ill, in the view of those who think with J. S. Mill (*On Liberty*, Ch. III) that "the despotism of custom is everywhere the standing hindrance to human advancement."

(*h*) Bacon—Essay XXXIX ("Of Custom and Education").

(*i*) "Qu'est ce que la nature? Peut-etre une première coutume, comme la coutume est une seconde nature" (*Pensées*, Art. III, § 13). So Greek philosophers, poets, and historians were never tired of extolling the paramountcy of custom in morals, and in social life. Pindar's νόμος δ' πάντων βασιλεὺς, θανάτων τε καὶ ἀθανάτων (*Fragm.*) is cited with approval by Herodotus (III, 18, who again in VII, 104, speaks of the δεσποτὴς νόμος), and by Plato, *Gorgias*, 484 B.

(*k*) The Platonic contrast was between the simplicity, unity, and therefore divinity, of the εἶδος or archetype, and the diversity, and therefore the evil, of the

of this essential distinction, or as a simple matter of history, there has been a constant growth and development in the variety of shapes and disguises behind which dishonesty may seek to hide itself, *pari passu* with the growing complexity of social and business transactions and the continual invention of new trades and devices (l). "Deceit is a very extensive head of the law," said BULLER, J., in an early and famous case (m). Its multiformity has again and again been insisted upon by judges, and was even given as a reason by Lord LANGDALE, M.R.—though it is a very insufficient one (n)—for the supposed fact, which, however, is not a fact (o), that "nobody has been able to define what fraud is" (p). At a much more recent date, it has been observed by Lord MACNAGHTEN that "fraud is infinite in variety; sometimes it is unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it" (q). The genera, species, and sub-species of misrepresentation are legion. In the motives which actuate the representor, in the modes and forms in which it may be conveyed (r), in the amount and kind of departure from the truth,—by plain perversion, by equivocation, by "economy," as the case may be,—the Lie, whether in the sixth or seventh degree of Touchstone's philosophy (s), is Protean. To say that "age cannot wither it, Nor custom stale its infinite variety," is to say much too little. Age propagates it, and multiplies its progeny, and custom gives ever new scope and vitality to its infinite variety.

482. The consequence of this growth in the complexity of fraud has been a corresponding increase in the complexity of the problems with which the law has been confronted. It is true that, as Buckle has observed, the main principles of morality have remained fairly constant in the history of civilization (t); but

manifold. Aristotle puts the matter in a more homely and practical fashion, when he insists that there is only one way of hitting the bull's eye, but many of missing it: τὸ μὲν γὰρ ἀμαρτάνειν πολλὰ ὥς ἐστι, τὸ δὲ κατορθοῦν μοναχῶς, and he adopts the popular view, expressed in a proverbial form in the verse cited by him,—ἐσθλοὶ μὲν γὰρ ἀπλῶς, παντοδαπῶς δὲ κακοί. And all language points in this direction, emphasizing, as it does, the contrast between the one straight line, or the one mark, and the manifold departures from this one line, or misses of this one mark: cp. the expressions "rectus," "ὀρθός," "straight," "square," "direct," "correct," "simple," "simplex," etc., on the one side, with "prævus," "crooked," "tortuous," "oblique," "indirect," "ἀμάρτημα," "double," "duplicity," etc., on the other.

(l) Thus the various frauds connected with companies, trusts, rigging of markets, auction sales, outside brokers, furniture dealers, etc., have been of gradual growth. Every new business, in opening up an avenue for honest enterprise, has at the same time proved a nursing ground for new "trade tricks" of its own.

(m) At p. 56 of *Pasley v. Freeman* (1789), 3 Term. Rep. 51.

(n) Because to define fraud in general terms is not precluded by the multiplicity of matters to which the term so defined may be applicable.

(o) The Roman jurists defined *dolus*, though necessarily and properly, in terms of the utmost generality, as either simulation or dissimulation for the purpose of misleading another person: see § 504 in App. C, Sect. 1, *post*.

(p) At p. 303 of *Franks v. Weaver* (1847), 10 Beav. 197. The true view is expressed by Dr. Story (*Equity Jurispr.*, vol. i, § 412), where he points out that fraud, like accident and mistake, by reason of its "infinite variety in form, character, and circumstances, is incapable of being *adjusted*,"—that is, *applied*,—"by any single and uniform rule. Of each of them, one might say, *mille trahit varios adverso sole colores*." This statement recognizes, by implication, that the condition of *adverso sole* or "against the light" may be defined, without limiting judicial discretion in its application of the definition to the particular colours which the turn of the kaleidoscope may in the individual case disclose.

(q) At p. 221 of *Reddaway v. Banham*, [1896] A. C. 199, H. L. With reference to the last sentence of the passage cited, the theory would have appealed to the ingenuous American merchant who "had tried both" with greater force in an inverted form, viz. that honesty would be fraud itself if it could only afford it.

(r) See Chapters III, IV, and V, *ante*.

(s) *As You Like It*, Act V, Sc. 4.

(t) In the literature of all countries and ages the primary rules of ethics, in reference

this proposition in no way conflicts with the equally true one that the science of casuistry, or the application of these simple principles to particular cases has become more and more difficult, in proportion as the cases themselves have multiplied, together with those "divided duties" which are the inevitable outcome of a more complicated state of society. In primitive times, the questions addressed to jurisprudence and ethics admitted of a prompt and plain answer, because the matters of fact to which the ethical rules were to be applied were as simple and direct as the rules themselves, and there was little or no conflict between juridical and popular sentiment. But when, in the course of time, the problems submitted for decision became less easy of solution, because the same simple principles had to be applied to highly complex facts, and when these problems began to far exceed in number those of the old type, and the mercantile community set itself to introduce and encourage dubious practices, and, after a decent interval, clamoured for their recognition by the law as customs, merely because they were customs,—the courts of the land stood at the parting of the ways, and were faced with a clear duty, which, unmoved by the *civium ardor prava jubentium*, they discharged with unbending constancy. Thus began, in reference to commercial customs opposed to plain principles of honesty, a contest between the uncompromising inflexibility which comports with the high office of judicature, and the pliant casuistry demanded by mercantile interest. This warfare, in one form or another, has been waged ever since, and is not even now by any means extinct. For the moral fibre once relaxed, never regains its tone "*nec vera virtus, cum semel exiit, Curat reponi deterioribus*," so long as the convenient "justification by custom" remains an article of commercial faith, and the individual trader's conscience is stupefied and debauched, and made to assume baser shapes, by these Circean enchantments.

483. As early as the time of Lord MANSFIELD, and probably much earlier, merchants began to solicit the courts to incorporate their knaveries into the common law on the ground that they had been consecrated by usage. The solicitations were vain. The law, which is "founded on the reason and custom of generations" (u), and not on custom alone, devoid of reason or right, "*rejecit alto [jussa] nocentium vultu, et per obstantes catervas explicuit sua victor arma*." Dishonest practices and dubious customs in the matter of auction sales (x), "rigging the market" (y), insurance (z), secret commissions (a), and misrepre-

to veracity, are expressed in much the same terms: cp. Homer (whom Justinian, in one of the *epistolæ* prefixed to the Digest, commends as *patrem omnis virtutis*), *Il.* ix, 309 *sqq.*—

χρὴ μὲν δὴ τὸν μῦθον ἀπληγέως ἀποπειπεῖν,
ἢ περ δὴ φρονέω τε, καὶ ὥς τετελεσμένος ἔσται
ἐχθρὸς γὰρ μοι κείνος δμῶς Ἀἴδαο πύλῃσιν
ὅς χ' ἕτερον μὲν κεύθη ἐνὶ φρέσιν, ἄλλο δὲ εἴπῃ,—

with Horace's portraits of Regulus, Lollius, and other Roman worthies, his "*Justitiæ soror, Incorrupta Fides, nudaque Veritas*," and his

"Fingere qui non visa potest
Hic niger est . . .
. . . hunc tu, Romane, caveto,"

and with King David's "*Quid debeatur aut quid apponatur tibi ad linguam dolosam ? Sagittæ potentis acutæ, cum carbonibus desolatoriis*" (*Ps.* cxx. 3, 4).

(u) Lord Acton's *Hist. of Freedom*, &c., p. 72. The expression used in one of the old cases is: "the common laws comply with the Genius of the Nation."

(x) See *Beawell v. Christie* (1776), Cowp. 396, *per* Lord MANSFIELD, C.J., at pp. 396, 397, and Ch. XIII. Sect. 2, *ante*.

(y) *Scott v. Brown, Doering, McNab & Co.*, [1892] 2 Q. B. 724, C. A., *per* LINDLEY, L.J., at p. 729, who, to the contention that "rigging the market" has become a common thing in the city, pertinently observes that so has picking pockets.

(z) See the views expressed by Lord MANSFIELD, C.J., in *Carter v. Boehm* (1764), 3 Burr. 1905, at p. 1910.

(a) See *Gillett v. Peppercorne* (1840), 3 Beav. 78 (*per* Lord LANGDALE, M.R., at

sentation and non-disclosure generally (*b*), have been the subjects of these strenuous efforts to obtain the countenance and connivance of the law in debasing the moral currency. Hence a prodigious collection of decisions, necessitated and justified by the frequency and persistency of the attempts upon the purity of judicature (*c*). In all of them the law has risen superior to the mercantile morality of the age, and sometimes also to the careless and lax views of the average non-mercantile citizen, on questions of veracity and good faith (*d*). The contest is still going on; indeed, it may be said to exist now in an acuter form than ever, for, whilst mercantile honour, on the one hand, is becoming daily more indulgent to "tricks of the trade," "showman's privileges," and the devices and frauds of advertisers, and projectors of public undertakings (*e*), the courts, on the other,

p. 83, who refused to listen to the plea that "this is everyday practice in the city," viz. for an agent to sell his own property to the principal without disclosing the fact, thereby misleading him into the belief that he is doing that which he is employed to do, viz. to buy property on his behalf from a third person); *Turnbull v. Garden* (1869), 20 L. T. 218 (*per* JAMES, V.-C., at p. 220: "it was not the first time the court had heard of, and disapproved, the custom of 'salting invoices'"); *Robinson v. Mollitt* (1875), L. R. 7 H. L. 802 (*per* MELLOR, J., at p. 816, BRETT, J., at pp. 817-819, 825, and Lord CHELMSFORD at pp. 837, 838); and the cases of secret commission cited in note (*e*), *inf.*

(*b*) See several of the examples of implied representation by acts and conduct, and by reticence and silence, given in Ch. III, Sect. 2, and Ch. IV, Sect. 3, respectively.

(*c*) As it is put in the old distich:

"Quæris cur crescant tot tanta volumena juris:
In promptu causa est: crescit in orbe dolus."

(*d*) For instance, the practices of including other persons' property in the effects to be sold, and secretly employing puffers at auction sales were, as early as the time of the Revolution, looked upon by the average member of society with no great disfavour, if we may judge from Roger North's account (in Ch. XV of his Autobiography) of his sale of Sir Peter Lely's pictures as trustee of the painter's estate. "At Easter," he says, "I opened the sale, and all along made this declaration, that nothing was exposed but what Sir Peter Lely left without any alteration, and nothing subtracted, but the whole laid before them, and without any false bidding." He first sold the pictures, and then the prints and drawings, "until this wonderful Revolution came and hindered me." On this occasion also, he "made the same profession as at the former sale, that it should be perfectly candid, without addition, subtraction, or false bidding," which elicited from a purchaser some cynical observations: "I remember," writes the autobiographer, "a lord, now a duke, said 'Damn me, what care I whether the owner bids or not as long as I can tell whether I will buy, and for what?' But I answered that since we had made that declaration, I thought myself bound to hold to it."

(*e*) One need only refer to the deterioration of mercantile sentiment in such matters as the promotion of companies,—where the deterioration was not long ago deemed by a Chief Justice (Lord RUSSELL) so notorious and making such rapid and scandalous advances as to call for public animadversion and reproof in an address delivered by him to the then Lord Mayor,—or the bribing and corruption of agents by secret commissions and presents, which is still to many a trader the very breath of his nostrils, and which, as such, has provoked in recent times more than one judicial condemnation; see, for instance, the observations of FIELD, J., at p. 552 of *Harrington v. Victoria Graving Dock Co.* (1878), 3 Q. B. D. 549 ("the present case affords an instance how sadly loose commercial practice has become in transactions of this nature"), and those of ROMER, L.J., who, at p. 45 of *Hovenden & Sons v. Millhoff* (1900), 83 L. T. 41, C. A., after stating his belief—surely a far too generous one—that "the mercantile community as a whole appreciate and approve of the court's views on the subject," makes haste to add that "some persons undoubtedly hold laxer views. Not that these persons like the ugly word 'bribe,' or would excuse the giving of a bribe"—that is, *eo nomine*, the Lord Justice must mean,—"but they differ from the courts in their view of what constitutes a bribe." That the "some persons" referred to here are really the majority, and that those who are supposed by ROMER, L.J., to represent "the mercantile community as a whole" should rather be designated as the "some persons," will not be doubted by any one who is conversant with the strong tendency of juries in modern times to return verdicts, in the

have been forced to present a more unyielding front than ever to the active opposition, or passive resistance, not of any interested sections of society, but of society at large, and even to rouse the legislature itself from a not very creditable lethargy and indifference (*f*).

484. Taking the whole course of the history of English law, in respect to misrepresentation, no less than other departments, it may be fairly said that judicial pronouncements and principles have never fallen short of current standards, practices, and views (*g*), whilst, in many cases, they have tended to stimulate higher ideals than those for the time being in favour (*h*); and that, in the main, our jurisprudence, in matters of veracity and good faith, is not obnoxious to either of the two opposite reproaches which from time to time have been levelled against it, viz. on the one hand, that its nets are too slight in texture to hold any but the smaller fry, and let the monsters of the deep break through; on the other, that it is too coarsely framed to capture the slender and sinuous things which easily slide through its wide meshes, though strong enough to hold what is gross and palpable.

SECT. 2. ENGLISH LAW OF MISREPRESENTATION CONSIDERED IN RELATION TO PHILOSOPHICAL AND THEOLOGICAL CASUISTRY.

485. The English law of misrepresentation has always kept pace with the doctrines of moral and casuistical philosophy, except as to one or two matters

teeth of the evidence, in favour of men proved to have taken secret commission, and the strong under-current of opposition which Lord Russell and Sir Edward Fry encountered before they could obtain legislative recognition of the immorality of this species of corruption. As to the ethics of truthfulness in word and deed, it has been truly observed, and justly lamented, by VAUGHAN WILLIAMS, L.J., on a recent public occasion, though not *ex cathedra*, that this virtue is losing rapidly that high place in the sentiment of the community that it was wont to hold. "A charge of fraud," said Lord ESHER, M.R., in *Le Lievre v. Gould*, [1893] 1 Q. B. 491, C. A., "is such a terrible thing to bring against a man" (p. 491). But it may be doubted whether either fraud, or a charge of fraud, is regarded as such a very "terrible" thing by the ordinary trader now, even if it was in 1893; and whether, on the contrary, it is not more correct to say that it is now both practised, and imputed, on so extensive a scale, and in such a variety of modes, as to provoke little reprobation in the one case, or resentment in the other; particularly, where the "ugly name" is avoided, or where the fraud is committed *secundum artem*, and in accordance with such usages and rules as have been approved by the dingy code of modern mercantile ethics.

(*f*) It was several years before the Prevention of Corruption Act, 1906, was passed, and it may be doubted whether it has been, or is likely to be, enforced with much rigour, and whether the mercantile community is not even now rapidly, if insensibly, sliding back into the old groove. A similar state of things moved Cicero's lament that in his time certain breaches of good faith were no longer disapproved by current morality, nor forbidden by either statutory or non-statutory jurisprudence: "*hoc . . . video, propter depravationem consuetudinis, neque more turpe haberi, neque aut lege sanciri aut jure civili*" (*De Off.* III, 17).

(*g*) Lord ESHER, M.R., at p. 558 of *Blackburn, Low, & Co. v. Vigors* (1886), 17 Q. B. D. 553, C. A., expresses, in his usual virile English, his firm opinion that "every general proposition"—("every" is too wide; there are some general propositions of law which are entirely void of ethical context, such as those which are based on public convenience alone, or those which relate to the passing of property)—"laid down by judges as a principle of law . . . is the statement of some ethical principle of right and wrong, applied to circumstances in real life, that is, in the life of social intercourse, or in the life of business. If the suggested principle is not obviously a rule of right and wrong, or if the suggested application cannot be supported by the suggested principle, the proposed application must be wrong, or must be supported by some other principle of right and wrong, or cannot be supported at all."

(*h*) In respect of the rules of equity, which are now the rules of every court, KINDERSLEY, V.-C., at p. 723 of *Bodenham v. Hoskins* (1852), 16 Jur. 721, delivered himself of the following encomium: "almost all the principles which are acted upon by a court of equity are pervaded by a higher and purer and more exalted tone of morality than that which prevails among mankind, even among the moral portion of mankind."

where the distinction between the practical purposes of jurisprudence and the personal ideals of ethics have necessitated a departure (*i*). In some cases, this general agreement takes the form of an express adoption by the law of the principles of moral philosophy; in others, the rules of the two systems are found in fact to coincide, though the result may be arrived at by different processes of reasoning, or may be based on different considerations.

486. Instances are plentiful of rules of law relating to misrepresentation having been declared in terms by judges or jurists to be founded on the doctrines of ethics. Thus Lord CAMPBELL, L.C., vouches "moralists," as well as "jurists," for the rule that "words are to be understood . . . in the sense in which the person using them wished and believed that they should be understood by the person to whom they were addressed" (*k*); and, for all those rules of conscience as to concealment, reticence, *uberrima fides*, in respect of communications in the negotiating and procuring of contracts and transactions, the Chancery judges, as might be expected from the origin and history of their jurisdiction (*l*), and those common law judges who most favoured the importation of equitable principles, such as Lord MANSFIELD, C.J., and, at a later date, SHEE, J. (*m*), were in the habit of citing and relying upon the views of Stoic philosophy as incorporated in the ethicojurial system of Cicero (*n*). Examples of actual coincidence of doctrine, without any express profession of reliance or derivation, are still more numerous (*o*); indeed, according to Lord ESHER, M.R., such actual coincidence is universal, not merely in the law of misrepresentation, or in any particular province, but in all departments of the common law alike (*p*).

487. Of all the moral philosophers, at least of all the English moral philosophers, on whom reliance is expressly placed by judges and writers on jurisprudence for the elucidation of the principles of the law of misrepresentation, Paley stands supreme. And justly so. He had qualifications and gifts which entitled his doctrines and views to special consideration by jurists, and which are nowhere more happily described than by the late Mr. F. D. Maurice (*q*). "An Englishman," he said, "can never allude to Paley without remembering how eminently English he was in all the habits of his mind, in his exquisitely transparent style, in a kind of quaint, homely humour . . . and in his detestation of everything which appeared to him unpractical. These, with a most genial temperament and an acuteness developed by visits to our law courts, and the study of evidence, may assure us that he will give us much that his predecessor (*r*)—however he may have been excelled by him in the special refinement and richness of the Greek mind—could not give" (*s*). It is not a matter of surprise,

(*i*) See §§ 495-498, *post*.

(*k*) At p. 50 of *Piggott v. Stratton* (1859), 1 De G. F. & J. 33. The rule referred to is discussed in § 79, *ante*.

(*l*) See Spence's *Equitable Jurisdiction*, and Lord Halsbury's *Laws of England*, title "Courts," vol. ix, p. 52 (*k*).

(*m*) See Lord MANSFIELD's judgments on the equitable action of money had and received, on the duty of disclosure in marine insurance, and on secret bidding at auction sales. In the last matter, he even out-equited equity. As to SHEE, J., see his judgment in *Lee v. Jones* (1864), 17 C. B. (N. S.) 482, Exch. Ch.

(*n*) See App. C, Sect. 3, *post*.

(*o*) See §§ 492, 494, *inf*.

(*p*) See note (*g*), *sup*.

(*q*) In his Inaugural Lecture to a course on Casuistry, Moral Philosophy, and Moral Theology, delivered in the Senate House, Cambridge, on the 4th December, 1866.

(*r*) The reference is to Aristotle, between whom and Paley he institutes a comparison, describing these two philosophers as the most serviceable of all in the study of casuistry.

(*s*) Thus Paley relied on jurisprudence for many of his ethical rules, as jurisprudence relied on him for many of its rules of law. A substantial parallelism between the two is, therefore, the natural result. As to Paley's more than bowing acquaintance with the practical side of law, referred to in the passage cited in the text, we learn from the *Memoirs of William Paley* by G. W. Headlam (2nd ed., 1810),—what, indeed,

therefore, that from the first his works attracted the attention of practical lawyers as well as of jurists. Erskine, at a trial before Lord ELLENBOROUGH, C.J., in 1803, recommended the study of his writings to all members of his profession (t). In his reference to "moralists," in 1859, and their rules for the interpretation of representations, there can be no doubt that Lord CAMPBELL, L.C., had Paley especially in mind (u). In 1871, HANNEN, J., in dealing with a similar question, says that "the rule of law applicable to such a case is a corollary from the rule of morality which Mr. Pollock cites from Paley" (x). In 1873, with reference to a contention that a false pretence should be treated in the same way as larceny, BRAMWELL, B., observed: "to such reasoners I give the recommendation contained in the excellent article in the Law Times of the 25th January, 1873, where it is said, 'A metropolitan County Court Judge might with advantage read and inwardly digest Paley's *Moral and Political Philosophy* . . . in which the necessity for positive rules of general application, the doctrine of particular and general consequences, and the superior importance of, and regard due to, general consequences are clearly expounded'" (y). Many other examples of the conscious, or unconscious, judicial adoption of the sense and substance, if not the *ipsissima verba*, of Paley's ethical rules, are to be found in various parts of the Commentary (z). Authors of treatises on jurisprudence are no less liberal in their references to this great casuist, whether by way of approval or criticism, in relation to the law of representations and promises (a), as in relation to other juridical topics, such as bailments (b), or defamation (c).

488. The "cases of conscience" which have given rise to the greatest difficulty in philosophical and theological as well as in juridical casuistry, and as to which, therefore, it might be expected that the widest divergence between the two systems would be disclosed, are cases of silence, or reticence, or withholding of the complete truth, cases of ambiguous statements, or equivocation, and cases of "pious frauds" or justifiable falsehoods. But, even here, very little substantial discrepancy is to be noted between the actual conclusions of jurisprudence and those of philosophical or theological ethics of the most generally received type, though, the standpoint and attitude being different, the conclusions are occasionally the outcome of different premisses. Most of the theological writers on morals, such as Cardinal de Lugo (d), follow the order of treatment and the principles which are to be found in the Digest, adding rules for the special application of these

any reader would infer from a mere perusal of the *Moral and Political Philosophy*,—that this is a well-established fact. When a boy, Paley attended, and was greatly impressed by, the trials at the Lancaster Assizes, though it may be that it was then chiefly the dramatic side of a trial which appealed to him (*Memoirs*, p. 5): on the 3rd May, 1759, he heard the trial of Eugene Aram, whom he shrewdly described as "a man who got himself hanged by his own cleverness" (*Ibid.*, pp. 7–9). He also paid regular visits to the Old Bailey, where he had a special place near the Bench, and took in the Old Bailey Session papers from 1763 to 1765 (*Ibid.*, pp. 142, 143); and he became a local magistrate in 1795 (*Ibid.*, pp. 100, 101).

(t) See the *Memoirs of William Paley*, above cited, at p. 208.

(u) See note (k), *sup.* The statement of the rule in Paley is cited in § 79, *ante*.

(x) At p. 610 of *Smith v. Hughes* (1871), L. R. 6 Q. B. 597: see note (b) to § 82, *ante*.

(y) At p. 59 of *R. v. Middleton* (1873), L. R. 2 C. C. R. 38.

(z) See Chapters II, III, IV, *passim*.

(a) See Story's *Equity Jurisprudence*, vol. i, § 205, as to a vendor's duty of disclosure, where Paley is cited with approval, and Austin's Lectures on Jurisprudence, vol. i, p. 456, where the philosopher's doctrine of deceptive promises is approved in the main, but corrected in one particular: see note (b) to § 82, *ante*.

(b) See Story on Bailments, § 182: "Dr. Paley, in his Treatise on *Moral Philosophy*, has, with his usual good sense, put the case of mandates on a reasonable ground."

(c) In Bacon's Abridgment, Slander, the view insisted upon by Paley that "truth may be made instrumental in malicious designs as well as falsehood" is adopted.

(d) The treatise referred to is entitled "Joannis de Lugo Hispalensis, E Societate Jesu, E. R. E. Cardinalis, Disputationes De Justitiâ et Jure." Disp. XXII is the one which relates to Dolus, Deceptio, and Error.

principles to matters of the Church, and to the conditions of Christian society. So far, therefore, as the English law of misrepresentation diverges from the Roman law of *dolus* (*e*), and no further, it diverges from the casuistry of the theologians. But there are also certain special and extreme views of theological ethics as to the right and duty of "reserve," and the doctrine of "the Economy," to which English law peremptorily refuses its assent. But it only does so, it should be observed, where such assent would also be refused by the best English authorities on ethical questions.

489. The doctrines referred to are those first promulgated, or, at least, first put into a clear and definite form, by St. Alfonso de' Liguori, a powerful Italian casuist (*f*), who, in relation to the duty of veracity and good faith in representation, lays down certain rules (*g*) which may be reduced to, and are expounded by Cardinal Manning in the form of, six propositions (*h*). The first four of these are quite elementary and unexceptionable, and may here be passed over; but great difficulty and discussion has been provoked by the fifth and sixth, or rather by the sixth, with the light thrown upon it by the fifth. The two last-mentioned rules, as stated by Cardinal Manning, who apparently approves of them, are: first, that to use *restrictio purè mentalis*, i.e. when the words heard are false" (by which is meant, when the language used admits of one meaning only, and in his secret mind the representor uses the words in a different and restricted meaning, which he knows the words do not bear, and in which he knows that the representee does not understand them) "is falsehood, condemned by Innocent XI"; but, secondly, "that to use words which are true, but ambiguous, is lawful. This is *restrictio non purè mentalis*, because the words are used without any mental supplement" (*i*). The first of these propositions does not require any roundabout theory of a mental restriction or supplement to recommend it, or any pontifical benediction to confirm it. The man who makes a statement which he knows to be untrue is telling a lie (*k*). The second rule, it is to be understood as Cardinal Manning understands and (to one's amazement) accepts it, betrays an atrocious confusion of not only ideas, but principles, and is utterly repugnant to every sound code of juridical, popular, philosophical, and (as will be shown presently) theological ethics. The curious juxtaposition of words in the phrase "true, but ambiguous" shows that what is intended to be described is a representation which is true in one sense, but admits of another in which it is false; and it must further be supposed, in order to raise any question of casuistry at all, that the representor knows that the representee may understand it in the sense in which it is false. And it is suggested that to hold silence at this point, to put forth a statement known to be ambiguous and, therefore, ambidextrous, and to leave the representee with at least an even chance of being deceived, is not conduct involving any "mental supplement," or, therefore, any guilt! It need hardly be said that, if this is the generally received view of theological casuistry, English, as well as

(*e*) See App. C, Sects. I and 2, *post*.

(*f*) This eminent theologian, saint, and doctor, was born in 1696: he became a priest in 1726, a bishop in 1762, and died in 1787. He spent fifteen years in compiling his great treatise, which contains the doctrine referred to in the text, the *Theologia Moralis*, which, in 1753, he dedicated to Pope Benedict XIV, describing it as a *via media* between the two extreme schools of casuistry, the "strictest sect," who were driving people from the Church by the harshness and impracticability of their rules, and the "laxists," who, from the opposite point of view, gave occasion to the enemy to blaspheme. He was canonized in 1839, and declared a doctor of the Church in 1871.

(*g*) *Theolog. Mor. Lib. III. Tract. ii, §§ 151-153.*

(*h*) In a letter from Rome, dated the 28th February, 1854, which is set out in Purcell's Life of the Cardinal.

(*i*) *Ibid.*

(*k*) Such "mental restriction" is, translated into simple language, neither more nor less than the plain lie of the man whom Achilles hated as the gates of hell, or the "cum aliud simulatur, aliud agitur" of the Digest.

every other system of jurisprudence, ancient or modern, rejects and abhors it (*l*). It is no less vile and abominable than the Euripidean ἡ γλῶσσ' ὁμώμοχ', ἡ δὲ φρὴν ἀνόμοτος, or the answer of the Milanese to the Emperor Frederick I—"we swore, indeed, but we did not promise to keep our oath" (Puffendorf's *Du Serment*, 459). But it may be confidently asserted that this is *not* the generally accepted doctrine of the best casuists, for it is repudiated by that great Englishman, as well as great divine, Cardinal Newman, who was stung into a close examination and (subject to the above repudiation) a just and eloquent defence of the theories of "the Economy" and of "Reserve" by the virulent and coarse pamphlet of a person whom he describes, without naming him, as his "Accuser" (*m*). He points out, in this exposition, that the doctrines in question are based on the injunction—"Cast not thy pearls before swine" (*n*), and that they relate to three kinds of dealing with truth, viz. first, concealing it, when it is possible to do so without deceit (the *Disciplina Arcani*); secondly, "stating it only partially"; and, lastly, "representative truth," by which is meant the statement of truth in such a form as to make it intelligible to a learner or inquirer who could not understand it if expressed nakedly (*o*). The last two kinds of statement the Church calls "lies" (*p*). "St. Alfonso Liguori, then," he proceeds, "it cannot be denied, lays down that an equivocation (that is, a play upon words, in which one sense is taken by the speaker, and another sense intended by him for the hearer) is allowable, if there is a just cause, that is, in an extraordinary case" (*q*), and adds: "I shall give my opinion on this point as plainly as any Protestant can wish; and therefore I avow at once that, in this department of morality, much as I admire the high points of Italian character, I like the English rule of conduct better; but, in saying so, I am not, as will shortly be seen, saying anything disrespectful to St. Alfonso, who was a lover of truth, and whose intercession I trust I shall not lose, though, on the matter under consideration, I follow other guidance in preference to his" (*r*). He then cites Paley, Jeremy Taylor, and others for "the English rule of conduct" (*s*), and repeats, with reference to that of St. Alfonso, "I plainly and positively state, and without any reserve, that I do not at all follow this holy and charitable man in this portion of his teaching," in which refusal he says that he does not stand alone, citing a passage from Natalis Alexander ("they certainly lie . . . who make use of mental reservations and equivocations . . . since they signify by words what they have not in mind, contrary to the end for which language was instituted, viz. as signs of ideas. Or they mean something other than the words signify in themselves, and in the common custom of speech"), and adding extracts from the "beautiful and complete Catechism" of the Council of Trent, which adopts the maxim enunciated by St. Augustine—"whoso conceals a truth, and whoso puts forth a lie, each is guilty, the one because he is not willing to do a service,

(*l*) As to the rules of law on this question, see Ch. IV, Sect. 4, Sub-s. (1), and, particularly, § 82, *ante*.

(*m*) This person, as we learn from p. viii of the Preface to the *Apologia pro Vitâ Sûâ*, had written in his pamphlet: "how can I tell that I shall not be the dupe of some cunning equivocation, of one of the three kinds laid down by the blessed St. Alfonso da [*sic*] Liguori and his pupils, even when confirmed by an oath, because then we do not deceive our neighbour, but allow him to deceive himself?" This, says the Cardinal (Preface, p. ix), led him to write the *Apologia*. The doctrines in question are the subject of pp. 269-282 in Ch. V; of Note F ("The Economy") at pp. 343-347; and of Note G ("Lying and Equivocation") at pp. 348-363.

(*n*) *Apol.*, p. 269.

(*o*) *Ibid.*, pp. 269-282.

(*p*) *Ibid.*, p. 270.

(*q*) St. Alfonso calls such statements "amphibologiæ": the passage which deals with them, and with their three species, is in the *Theol. Mor.*, Lib. III, Tract. ii, § 151.

(*r*) *Apol.*, p. 273.

(*s*) *Ibid.*, pp. 274-276.

the other because he has a mind to do a mischief" (*t*).—and which inculcates other precepts in no way falling short of, but on the contrary going beyond, the requirements of law (*u*).

490. Equivocation is stated by the casuists to be of two kinds, that which consists in a play upon words (the type above adverted to), and that which consists in evasion or prevarication, by diverting the mind of the person intended to be misled into other channels, and so avoiding the necessity of making any definite statement, and, therefore, any misrepresentation (*x*). To the latter type the law of misrepresentation has nothing to say, because *ex hypothesi* the case is not brought within the limits of this department.

491. Silence which is so eloquent of almost every human emotion—anger, consternation, awe, grief (*y*), love (*z*), reproach (*a*), or disdain (*b*)—which, when habitual, is considered an index of wisdom and strength of character (*c*), or the means of acquiring a spurious reputation for it (*d*)—may be equally indicative of acts or states of the mind or will. It may indicate adoption of an assertion made, or assent to an act or course of conduct pursued or proposed by another (*e*), and, in either of these aspects, it may become amenable both to the legal and the ethical code. Neither the law, nor ethical casuistry, doubts that silence may be designed to mislead, and may in fact mislead (*f*). Both systems repudiate deceptive reticence, but excuse, or even approve (*g*), a secrecy which is merely

(*t*) *Apol.*, pp. 279-281. St. Augustine's rule is more far-reaching than that of English law, so far as it includes a prohibition of any concealment of truth which involves merely a neglect to render a service, without being a violation of a definite duty of disclosure, or a rendering false of something which has been stated: see Ch. IV, Sect. 4, Sub-s. (2), *ante*.

(*u*) Such as (*ibid.*, pp. 280, 281) the warning against "affirming for certain what has not been verified," which is the rule of law laid down in Ch. V, Sect. 1, Sub-s. (2), *ante*. Also the statement that "to deceive by a lie in joke . . . though to no one there accrues loss or gain in consequence, nevertheless is altogether unworthy," extends beyond the rule of law stated in § 102, *ante*, according to which such loss, or at least physical injury, is essential to actionability.

(*x*) Cardinal Newman, *Apol.*, pp. 356, 357. The latter kind of equivocation is discussed by Bacon in his essay on "Simulation and Dissimulation" (Essay VI).

(*y*) Terror, as in the Virgilian "vox faucibus hæsit": reverence, as in "deveni in altitudinem maris et silui." Niobe is the type of silent grief. Cp. Tennyson's beautiful poem on the widow of the "warrior dead": "she nor swooned, nor uttered cry."

(*z*) "Silence in love betrays more woe Than words though ne'er so witty," against which, however, must be set off Sir John Suckling's "Prithee, why so pale, fond love? Prithee, why so mute? Will, if speaking well won't move her, Saying nothing do 't?"

(*a*) Dido, on Æneas's visit to the Shades: "Illa solo fixos oculos aversa tenebat; Nec magis incepto vultum sermone movetur, Quam si dura silex aut stet Marpesia cautes" (Virg. *Æn.* vi, 469-471).

(*b*) Virgil to Dante: "non ragioniam di lor, ma guarda e passa."

(*c*) Tennyson's "one still strong man in a blatant land," William the Silent, and the other heroes of the Gospel of Golden Silence, which (as has been playfully observed) Carlyle preached in thirty volumes.

(*d*) "O, my Antonio, I do know of those Who therefore only are reputed wise For saying nothing" (*Merchant of Venice*, Act I, Sc. 1).

(*e*) See Story's *Eq. Jurispr.*, vol. i, § 399, as to silence with reference to an act proposed by another, where there is both a duty and a power to prevent its execution.

(*f*) Cardinal Newman's *Apol.*, p. 348, with which cp. Ch. IV, Sect. 4, Sub-s. (2), *ante*.

(*g*) Bacon, in his above-cited Essay—see note (*x*), *sup.*—says: "Nakedness is uncomely, as well in Mind as Body; and it addeth no small Reverence to Men's Manners and Actions, if they be not altogether Open. . . . Therefore, set it down that an Habit of Secrecy is both Politic and Moral." Shakespeare makes similar reflections on "these encounterers so glib of tongue, That give accosting welcome ere it comes, And wide unclasp the tables of their thoughts To every ticklish reader" (*Tro. and Cress.*, Act IV, Sc. 5).

used as a weapon of defence, or takes the form of a decent reserve, the only difference being that ethical philosophy is rather occupied with the purpose, and civil law with the effect.

492. It is agreed by both casuists and jurists that neither suppression of the truth (*h*), nor equivocation (*i*), nor the "lie direct," is permissible without a *justa causa* (*k*). Leaving the subjects of "the Economy," and equivocation,

(*h*) Cardinal Newman's *Apol.*, p. 358. The law puts it rather the other way,—that silence is not to be condemned without a *justa causa*, that is to say, without establishing the violation of some positive duty.

(*i*) Cardinal Newman thinks that, even if it be permissible to lie in obedience to a higher conflicting duty, it is not allowable under such circumstances to equivocate, and that if any departure from the duty of veracity can ever be excused, it can only be so if the delinquent, in Luther's phrase, *peccat fortiter*. See the *Apologia*, p. 360.

(*k*) See, for illustrations, §§ 118, 119, *ante*, and add to these the cases of the deceit practised by imaginative writers upon the reading public, for the purpose of heightening interest or giving local colour, such as the pretence by Horace Walpole that the *Castle of Otranto* was "a translation of a work found in the library of an ancient Catholic family in the north of England, . . . printed in Naples, in the black letter, in the year 1529" (Preface to first edtn. in 1764); or Defoe's assumption of the name of Robinson Crusoe, both of which cases are referred to by TINDAL, C.J., at p. 906 of *Wright v. Tallis* (1845), 1 C. B. 893, as examples of innocent inventions, in contrast with the case then before the court of a worthless original work masquerading in the guise of a translation of a book by a well-known author, for the purpose of defrauding the public. Of this latter kind were the ascriptions by Chatterton of his poems to the Bristol priest, the imaginary Rowley; for the "marvellous boy" undoubtedly by means of these inventions raised money from, amongst others, Horace Walpole himself, and made attempts, though in vain, to extract advances from Dodsley, the publisher, and the Bristol public generally, to whom, in his pathetic verses to his fellow townsmen on the eve of his suicide, he addressed the reproach: "you spurned the lad who gave you antique lays, And paid for learning with your empty praise." Yet, even after Chatterton's fraud was detected, Walpole continued for a time to champion him, urging that it was "no grave crime in a young bard to have forged false notes of hand that were to pass current only in the parish of Parnassus." And, when, at a later date, Walpole's advocacy came to an end, and Chatterton turned with fury on his former patron, the latter insisted that there was no difference between the two cases,—“Walpole, I thought not I should ever see So mean a heart as thine has proved to be . . . thou may'st call me cheat. Say, did'st thou never practice such deceit? Who wrote Otranto?” And certainly a case might well be made against Walpole which, if brought before TINDAL, C.J., in the form of a defence to an action, as in *Wright v. Tallis*, *sup.*, possibly might have succeeded, as the defence there succeeded. For, in his Preface above mentioned, Walpole emphasizes his falsehood by a promise that "should it meet with the success I hope for, I may be encouraged to reprint the *original Italian*, though it will tend to depreciate my own labours," which looks as if the author did intend to win "success," *i.e.* money, from the public by deceiving them. On the deception proving an excellent advertisement, and justifying a second edition, he apologized in the Preface to that edition "for having offered his work to them in the borrowed personage of a translator. As diffidence of his own abilities, and the novelty of the attempt, was the sole inducement to assume that disguise, he flatters himself that he shall appear excusable." Not a very convincing plea on the part of one who had in his pocket the pecuniary fruits of the "success" of the first edition,—a success which he avowed he hoped to obtain, and which in the result he did obtain, by means of statements which, so far from deceiving nobody, as TINDAL, C.J., thought, were admittedly intended as "disguises," and quite conceivably did so operate. At all events, it is difficult to see that the plea would not as well apply to Chatterton's case. For instances of literary forgeries, some of the undoubtedly guilty type, and others perpetrated in a spirit of mere vanity,—the one defrauding, and the other not, but both alike deceptive,—see J. A. Farrer's *Literary Forgeries*. Bentley, in his *Dissertation on the Letters of Phalaris*, distinguishes three types and stages of this practice. He says that during the rivalry between the libraries of Pergamus and Alexandria, great names were imputed to concocted manuscripts for the purpose of "fetching higher prices." Afterwards letters and speeches were frequently composed in the name of some famous person, by which device at first nobody was deceived, but, later, the fabrications were so skilfully

about which enough has been said, it is now proposed to examine what are regarded as *justæ causæ* by moralists, with a view of showing that substantially the same excuses are held valid by the law.

493. Ethical philosophy divides justifiable or excusable falsehoods into two main classes: those which do not deceive anybody at all, and those which, though they mislead the representee, and are intended to do so, are uttered with no intention of inflicting an injury, or with the positive intention of conferring a benefit, or otherwise *pour le bon motif*. The first class of *justæ causæ* are of course as exempt from judicial, as they are from ethical, condemnation. Indeed, no question arises of legal excuse; for such falsehoods, wanting one or both of two necessary ingredients in any cause of action whether for damages or rescission, viz. inducement and materiality, do not come within the definition of an actionable misrepresentation at all, and, therefore, do not require any affirmative plea to excuse them.

494. The second class creates more difficulty and raises nicer questions in the application of the received principles. But, as regards the principles themselves, there is a substantial correspondence between jurisprudence and ethics. The instances given by Cardinal Newman of the *causæ* which by most moralists—though it does not appear that the Cardinal agrees with them in every case (*l*)—have been accounted *justæ (m)*, are based on such theories as that veracity is only for the good of society (*n*), or that inaccuracy is a kind of transgression against justice (*o*), or that, in certain circumstances, an excuse for falsehood may be made as a concession to human frailty (*p*). On one or other of these grounds,

executed as to be taken for genuine. "This, no doubt, was great content and joy to them; being as full a testimony of their skill in imitating, as the birds gave to the painter who pecked at his grapes." Some confessed: "but," adds the critic, "more of them took the other way, and, concealing their own names, put off their copies for originals; preferring that silent pride and fraudulent pleasure, though it was to die with them, before an honest commendation from posterity for being good imitators." Other instances of non-deceptive literary misrepresentations are the speeches given by historians to the subjects of the narrative, when the language was mainly the author's, though the substance and the ideas attributed may have been in accordance with the facts, such as those which Thucydides put in the mouth of Pericles, or Livy into the characters of his Roman History, or again the speeches which Dr. Johnson put into the mouths of the politicians of his time. Sir R. C. Jebb, in note (2) to p. 434 of his *Essays and Addresses* (Essay on the Speeches of Thucydides), cites Crévier, who, in the Preface to his edition of Livy, excuses his author's practice—"quasi vero cuiquam innocens ille dolus imponat," and Gaillard, in his history of Francis I (1766), who, on being charged with *une petite infidélité* in this matter, answers: "je ne puis voir une infidélité réelle où d'un côté personne ne veut tromper, et où d'un autre côté personne ne peut être trompé." This last may stand as a good description of the whole class of non-deceptive falsehoods.

(*l*) Indeed, he would appear to disapprove energetically of some of them.

(*m*) See, for these illustrations, his *Apologia*, pp. 350, 351, 357, 358, 360-363. At p. 274, when comparing the doctrines of English moralists, he cites Paley ("there are falsehoods which are not lies"); Jeremy Taylor ("to tell a lie for charity to save a man's life, the life of a friend, of a husband, of a prince, of a useful and public person, hath not only been done at all times, but commended by great and wise and good men. Who would not save his father's life, at a charge of a *harmless lie*, from persecutors or tyrants?"); Milton ("what man in his senses would deny that there are those whom we have the best ground for considering that we ought to deceive,—as boys, madmen, the sick, the intoxicated, enemies, men in error, thieves? I would ask, by which of the commandments is a lie forbidden? You will say, by the ninth. If then my lie does not injure my neighbour, certainly it is not forbidden by this commandment"); and Dr. Johnson ("the general rule is that truth should never be violated; there must, however, be some exceptions. If, for instance, a murderer should ask you which way a man has gone").

(*n*) *Apol.*, p. 348. And see the italicized words in the Cardinal's citations from Jeremy Taylor and Milton, in the last note.

(*o*) *Apol.*, p. 348.

(*p*) *Ibid.*, p. 349. It is on this ground that certain kinds of homicide, assault, and

casuistry excuses lies told to prevent a crime, or the realization of the fruits of a crime, or in reply to a question as to which the interrogator is outlawed, so to speak, from the ordinary right to know the truth, as when a murderer asks which road his intended victim has taken (*q*); or lies and traps and devices to mislead a public enemy (*r*), or, generally, where there is a conflicting duty to which obedience is also due, provided that the good to society by preferring this conflicting duty outweighs, or at least countervails, the evil to society by violating the rule of veracity (*s*). And all these are no more actionable than they are morally censurable (*t*). Casuistry also excuses falsehoods uttered for the purposes of preserving life or health, or for the good of those who are diseased in body or mind (*u*), or myths and emblems and stories employed in the education of those of tender age (*x*). These too, since no damage can be shown, would be excusable in law. Lastly, both morals and jurisprudence refuse to condemn a false answer given to an officious inquisitor, who has no right to the information sought to be extracted, where a mere refusal to answer would be taken as an admission, as, for instance, a false denial of authorship or donorship by one who desires, and has a right, to preserve his anonymity or pseudonymity, or by a friend to whom the secret has been confided, or the like denial of a fact communicated in professional confidence, when the denial is in answer to an impertinent request on the part of one who has no title or claim to extort the truth (*y*).

defamation are either justified or excused, both by ethics and by law. "They are not sweet, the violence and the craft that do divide The world of nature; what is weak must lie; The lion needs but roar to guard his young; The lapwing lies, says 'here' when they are there. Threaten the child, 'I'll scourge you if you did it': What weapon hath the child, save his soft tongue, To say 'I did not'?" (Tennyson's *Queen Mary*, Act III, Sc. 5).

(*q*) *Apol.*, p. 361. And see the citation from Dr. Johnson in note (*m*), *sup*.

(*r*) Cp. Plato, *Rep.* II, 383 (πρὸς δὲ τοὺς πολεμίους), and Lucian's Philospheudes, as to the indulgence, or rather commendation, due to those who practise ruses upon an enemy, such as those of the πολέμητις Ὀδυσσεύς. Roman law recognized the legitimacy of artifices to defeat even a private adversary in litigation, etc. (*dolus bonus*), see App. C, Sect. 1.

(*s*) Newman's *Apol.*, p. 351. "And being not done," says Pandulph in *King John* (Act III, Sc. 1), "when doing tends to ill, The truth is then most done, not doing it. . . . And falsehood falsehood cures, as fire cools fire, Within the scorched veins of one new burned."

(*t*) As is shown in §§ 118, 119, *ante*.

(*u*) See the citations from Jeremy Taylor, and Milton, in note (*m*), *sup*, and cp. Plato, *Rep.* II, 383, *ubi sup*, where it is said that a lie τῶν καλουμένων φίλων, ὅταν διὰ μανίαν ἢ τίνα ἄνοιαν κακὸν τι ἐπιχειρῶσι πράττειν, τότε ἀποτροπῆς ἕνεκα ὡς φάρμακον χρήσιμον γίγνεται, and is told under such circumstances, and for such purposes, ὥστε μὴ ἄξιον εἶναι μίσους.

(*x*) Plato considered that it was not only excusable, but proper and right, to instruct youth in the form of allegory and myths and tales, deliberately fabricated for this purpose, before revealing to them naked truths: παιδεύειν δ' ἐν ἀμφοτέροις, πρότερον δ' ἐν τοῖς ψεύδεσιν (*Rep.* II, 377). This is what Cardinal Newman calls "representative truth," and illustrates at pp. 343-347 of his *Apologia*. See § 489, *sup*.

(*y*) Against a question which the interrogator has no right to ask, Bacon acutely observes that a downright lie, and not either silence or equivocation, is the only possible protection available: "Dissimulation . . . followeth many times upon Secrecy, by a necessity: So that he that will be Secret, must be a Dissembler, in some degree. For Men are too cunning, to suffer a man to keep an indifferent carriage between both, and to be Secret, without Swaying the Balance, on either side. They will so beset a man with Questions, and draw him on, and pick it out of him, that, without an absurd Silence, he must show an Inclination one way: Or if he do not, they will gather as much by his Silence, as by his Speech. As for Equivocations, or Oraculous Speeches, they cannot hold out long. So that no man can be secret, except he give himself a little Scope of Dissimulation; which is, as it were, but the Skirts, or Train, of Secrecy" (Essay VI: "Of Simulation and Dissimulation"). As to mendacious contradictions of authorship, as in the well-known case of Sir Walter Scott, see Newman's *Apol.*, p. 351, and (as to professional secrets) pp. 361, 362. With regard to the former, Cardinal

495. On the other hand, since ethical casuistry regards mainly the motive of the representor, whereas law looks principally to the effect upon the representee (2), it must necessarily be the case that many questions of vital import to morality are wholly outside the domain of jurisprudence, or, at least, of civil jurisprudence. "It is not every moral and social duty the neglect of which is the ground of an action. For there are some which are called in the civil law duties of imperfect obligations, for the enforcing of which no action lies." The *officia virtutis* which Lord KENYON, C.J., in the above passage (a), and, a century later, the House of Lords (b), described or treated as duties of imperfect obligation, are, from the point of view of some moralists, such as Kant (c), duties of perfect obligation, whilst the *officia juris* which the law regards as of perfect obligation, are, in an ethical aspect, since their sanction is not purely moral, of imperfect obligation. Nothing could more significantly illustrate the distinction between the attitude of the casuist and the attitude of the lawyer towards all such questions of conduct as are the common subject of both systems, including questions of veracity and good faith; as to which, after enunciating the equitable principles applicable, Dr. Story observes: "the principles of natural justice and social morals do, indeed, go further; and require the most scrupulous good faith, candour, and truth in all dealings whatever. But courts of justice generally find themselves compelled to assign limits to the exercise of their jurisdiction, far short of the principles deducible *ex æquo et bono*, and with reference to the concerns of human life, they endeavour to aim at mere practical good and general convenience" (d). Or, as Cicero puts it, "aliter leges, aliter philosophi, tollunt astutias: leges, quatenus manu tenere possunt, philosophi, quatenus ratione et intelligentiâ" (e). And equity, in times when its principles were more liberal than those of law and were administered by different courts, was under no less disability, in respect of all such matters as are within the *exclusive* jurisdiction of the *forum conscientiae*. "With such a conscience," said Lord NOTTINGHAM, L.C., as is only *naturalis et interna* this court has nothing to do; the conscience by which I am to proceed is merely *civilis et politica*, and tied to certain measures" (f); and, to the same effect, JERKYL, M.R., observed that "though proceedings in equity are said to be *secundum discretionem viri boni*, yet, when it is asked, *vir bonus est quis?* the answer is, *Qui consulta patrum, qui leges juraque servat*" (g). "There is a well-known case in the books,"

Newman thinks the question is complicated by the further inquiry, which may be necessary, whether a writer is justified in publishing anything for which he is not prepared to accept responsibility. The doctrine, however, of the right to conceal the truth from the *officious* inquisitor, is a delicate one: it may easily suggest, and slide into, a theory of the right to lie to an *official* inquisitor, as in the illustrations given by St. Alfonso (*Theol. Mor.*, Lib. III, Tract. II, §§ 154-171) of permissible lies in a court of justice, and as in the case of that "local and special morality" which, says Leslie Stephen (*Science of Ethics*, pp. 202, 203), "is often developed in regard to this virtue," or, the still more convenient theory of mendacity as a weapon of defence in all critical situations which was expressed in the board-school girl's ingenuous definition of a lie as "an abomination unto the Lord, but a very present help in the time of trouble," or in the reasoning of Odysseus in the opening scene of the *Philostetes*. For the rules of law in relation to all these questions, see §§ 118, 119, *ante*.

(2) Like history, as contrasted with the social judgment of the moment: "contemporaries look at the agents, their motives, and characters; history looks rather at the acts and their consequences" (Hare, *Guesses at Truth*).

(a) From his judgment in *Pasley v. Freeman* (1789), 3 Term. Rep. 51 (at p. 63).

(b) See *Derry v. Peek* (1889), 14 App. Cas. 337, H. L.

(c) See the Second Section of his *Metaphysic of Morals*.

(d) *Eq. Jurispr.*, vol. i, § 194.

(e) *De Off.* III, 17.

(f) At p. 600 of *Cook v. Fountain* (1670), 3 Swanst. 585.

(g) At p. 753 of *Cowper v. Earl Cowper* (1734), 2 P. Wms. 720. This was a case in which he felt himself constrained to give judgment for the plaintiff, though "were I" (he says at p. 734) "to consider the matter, not as sitting in judicature, but taking in all manner of considerations, such as honour, gratitude, private conscience, etc., I must think this claim should never have been made."

said Lord CRANWORTH, L.C., "with which those that practise in the courts are very familiar (*h*), in which upon a counsel saying to Lord THURLOW, 'Your lordship would think in point of honour,' so and so, Lord THURLOW said, 'upon that point you must apply to the person himself. I do not give any opinion on that subject'" (*i*).

496. Accordingly, in the matter of disclosure, jurisprudence, though requiring the utmost openness and candour in the particular classes of transaction which it deems *uberrimæ fidei*, and though prohibiting in all cases every such concealment and incomplete or partial statement as renders what is stated false (*k*), has found it impracticable and impolitic to enforce conformity to the high Stoical ideal of complete revelation under all circumstances of everything which the other party to the contract or transaction is interested in knowing, and, without knowing which, he would not be on equal terms with the party on whom the duty is cast (*l*). Thus Lord THURLOW, L.C., in reference to an illustration of a man purchasing an estate without imparting to the vendor his knowledge that a valuable mine is underneath the surface, says: "the question is, not whether the transaction be such as a man of honour would disclaim and disavow, but it must fall within some settled definition of wrong recognized by this court"; otherwise the court would be "undoing all the common transactions of mankind," and "rendering all their dealings too insecure" (*m*). And, on this topic, Dr. Story remarks that "Pothier has expounded this subject with his usual force and sterling sense 'As a matter of conscience,' says he, 'any deviation from the most exact and scrupulous sincerity is repugnant to the good faith that ought to prevail in contracts. Any dissimulation concerning the object of the contract and what the opposite party has an interest in knowing, is contrary to that good faith for, since we are commanded to love our neighbours as ourselves, we are not permitted to conceal from him anything which we should be unwilling to have concealed from ourselves. But in civil tribunals something plainly injurious to good faith' (that is, to positive rules of jurisprudence) 'must be shown to justify their interference'" (*n*).

497. So also, there are many misrepresentations implied from acts and conduct, by which delusive hopes and expectations are raised, and the most cruel injuries are inflicted, and which all ethical teaching on that account severely denounces, but of which the law, by reason of its necessary limitations, can take no account or notice (*o*). Similarly, the cases of mere exaggeration

(*h*) *Fox v. Mackreth*, cited in note (*m*), *inf.*, may have been the case referred to by Lord CRANWORTH. Cp. the observations of Lord COLERIDGE, C.J., at p. 46 of *Tatam v. Reeve*, [1893] 1 Q. B. 44, Div. Ct.: "if one man chooses to trust another in matters which are called matters of honour, he must do so at his own risk, and with full knowledge that he must suffer, if the person whom he has trusted chooses to repudiate what is called his debt of honour."

(*i*) At p. 773 of *Smith v. Kay* (1859), 7 H. L. C. 750.

(*k*) See Ch. IV, Sect. 4, Sub-s. (2), *ante*.

(*l*) As to the Stoical and Ciceronian views, see App. C, *post*.

(*m*) At p. 321 of *Fox v. Mackreth* (1788), 2 Cox, 320, 2 R. R. 55. See also for this and other illustrations of non-disclosure which are not amenable to civil consequences, § 91, and particularly the cases cited in notes (*u*), (*x*), (*y*), (*z*), (*a*), and (*b*) thereto.

(*n*) Story, *Eq. Jurispr.*, vol. i, § 194.

(*o*) STEPHEN, J., at p. 296 of *Alderson v. Maddison* (1880), 5 Ex. D. 293, remarks that "there is a class of false representations which have no legal effect. There are cases in which a person excites expectations which he does not fulfil, as, for instance, when a person leads another to believe that he intends to make him his heir, and then leaves his property away from him. Though such conduct may inflict greater loss on the sufferer than almost any breach of contract, and may involve greater moral guilt than many common frauds, it involves no legal consequences, unless the person making the representation not only excites an expectation that it will be fulfilled, but legally binds himself to fulfil it." The actual decision of STEPHEN, J., was reversed by the C. A., which reversal was confirmed by the H. L., *sub nom. Maddison v. Alderson* (1883), 8 App. Cas. 467, H. L.; but the above observations of STEPHEN, J., were approved by, and, indeed, formed the basis of the decisions of both appellate tribunals,

tion (*p*), and the falsehoods told in jest, producing no tangible loss or injury (*q*), and the misrepresentations made without due inquiry or care (*r*) which are not amenable to civil procedure, are undoubtedly condemned by the ethical code.

498. It is needless to say that neither the English, nor any system of jurisprudence can concern itself in the least degree with any form of misrepresentation of, or laxity connected with, the investigation or exposition of abstract or scientific or intellectual truth, unless the material interests of some individual or class are intended to be, and are in fact, affected thereby (*s*). It is doubtful, indeed, whether all systems of morals would take cognizance of such acts (*t*); but, unquestionably, the more ideal and exalted of them would do so. Plato, for instance, not only regarded error as falsehood, but as the most serious form of it,—as the *ὡς ἀληθὺς ψεῦδος*, in contrast with the far less important type of lie to which the name is ordinarily confined, the mere *ἐν λόγῳ ψεῦδος*. Self-deception was “the lie in the soul,” which engendered a state of moral, as well as intellectual, *στάσις*, conflict, and insurrection. But the obligation “to seek truth and ensue it,” in the sense of loyalty and allegiance to religious, scientific, political, or metaphysical truth, is a duty which, whether it may be deemed a social or moral obligation, has no juridical quality or import. Similarly as to the imparting or teaching of false doctrine in any of the above domains of thought. It is certain that jurisprudence cannot deal with such matters (*u*), and equally certain that nothing is more severely reprobated by any sound system of ethics than this poisoning of the wells of truth by the (whether wilful, or careless) dissemination of intellectual error.

499. Amongst the matters over which jurisprudence must needs disclaim authority, but which are yet well within the province of casuistry, the doctrine of the “categorical imperative” has not been expressly mentioned, for the reason that this doctrine is not accepted by the main body of moral philosophers; and if the law is justified in its policy of non-intervention in the cases already given, *a fortiori* it is justified in that policy, where to depart from it would be to “rush in, where angels fear to tread.” The theory in question, which proceeds on the basis that moral duty is absolute and autonomous, and admits of no exception under any circumstances, is the theory worked out by Kant in his *Fundamental*

the only difference being in the application of them to the facts. Other illustrations of the moral duty are given by Paley, *Moral and Political Philosophy*, vol. i, ch. v, cited in § 24, *ante*, with which cp. § 66 in Ch. III, Sect. 2, *ante*, for examples of its non-enforceability in law. Another instance is the simulated passion of a poor man for a woman of wealth or rank, for the purpose of inducing her to confer material benefits upon him, than which no conduct could be more morally censurable, or more productive of acute misery: yet the law cannot touch such a case, unless the misrepresentation of emotion is accompanied by some misrepresentation of fact.

(*p*) See Ch. II, Sect. 6, *ante*.

(*q*) See Ch. V, Sect. 1, Sub-s. (3), *ante*, where it is established that of the cases of misrepresentation by way of practical joke, or otherwise apparently motiveless, only those which produce material loss, or physical injury, are actionable. All such cases are nevertheless condemned by moralists: see note (*u*) to § 489, *sup*.

(*r*) See p. 376 of *Derry v. Peek* (1889), 14 App. Cas. 337, H. L., where Lord HERSCHELL recognizes this to be a “moral duty,” but explains that it is not and never has been, though he suggests that it ought to be (as it was, in a limited form and application, shortly afterwards) converted by the legislature into, a legal duty.

(*s*) See Ch. II, Sect. 1, Sub-s. (1), *ante*.

(*t*) *Ibid.*, and the reference therein to Aristotle's views on the subject. Leslie Stephen (*Science of Ethics*, p. 209), dealing with what he calls the “prudential qualities of a hatred for error,” says: “the man, indeed, who hates error will generally hate falsehood. ‘To thine own self be true, And it must follow, as the night the day, Thou canst not then be false to any man.’ This kind of virtue would belong, however, in the highest degree to the man who approximates as closely as possible to the calculating machine. Such a man, no doubt, would have, what may be called a purely intellectual love of truth; but of truth as opposed to error, and equivalent to accurate knowledge.”

(*u*) See § 140, in Ch. VII, Sect. 1, Sub-s. (1), *ante*.

Principles of the Metaphysics of Morals and his *Analytic and Dialectic of Pure Practical Reason*, and has been approved and applied by Cicero and St. Augustine; but it is subject, even in the sphere of conscience itself, to all manner of difficulties, and raises at every point, particularly when applied to the duty of veracity, an infinity of problems (*x*) which render its acceptance, as a working rule of practical casuistry, almost impossible, and, as a rule of law, wholly impossible. The proposition laid down by Kant was that "I am never to act otherwise than so that I could also will that my maxim"—that is, the rule of conduct determining the particular act—"should become a universal law" (*y*). Such a principle is designated by him a "categorical imperative," because it "represents an action as necessary of itself without reference to another end," as distinguished from what he calls a "hypothetical imperative," which "represents the practical necessity of a possible action as means to something else" (*z*). It is obvious that such a principle (*quod semper, quod ubique, quod ab omnibus*) in its application to human conduct admits of no exceptions, and no subservience to empirical or individual or occasional precepts or counsels; and that the theory has to face the objection that conformity to it in every case might involve the gravest social consequences, and the breach of other duties equally autonomous and independent. Conformity, for instance, to the absolute imperative of veracity, would require the disclosure to the murderer of the hiding-place of his intended victim (*a*), and it is said that Kant, when asked this question, did not shrink from declaring the necessity of such disclosure under such circumstances. Nor did St. Augustine repudiate the consequences of such a view of the absolute sanctity of the duty, holding that there could be no *justa causa* for a lie (*b*). But the Categorical Imperative ignores the case of "divided duty," and Kant never attempted to deal with this difficulty; which is the more strange, as every duty is conceived by him as of equal and co-ordinate sovereignty, like so many independent States, and he is continually speaking of "a kingdom of ends." And we find that even Cardinal Newman, after stating, in a passage of tremendous majesty and power, that "the Catholic Church holds it better for the sun and moon to drop from heaven, for the earth to fail, and for all the many millions on it to die of starvation in extremest agony, as far as temporal affliction goes, than that one soul . . . should commit one venial sin," mentions amongst his illustrations of "sin" the telling of "one wilful untruth . . . without excuse" (*c*). On the whole, therefore, it may surely be concluded that the main teaching of practical casuistry, and certainly that of jurisprudence, in relation to misrepresentation, as in relation to all other departments of morals, must take into consideration the possible coexistence and conflict with the duty of veracity, of other duties of equal sanctity, and cannot treat any one as supreme over the rest; though neither law nor ethics gives any countenance to the lax principles which interested wrongdoers may seek to derive from this recognition, such as "do evil that good

(*x*) "Souffre beaucoup de difficulté, même dans le for de conscience," as Pothier says, with reference to Cicero's Stoical theory. See § 512, *post*.

(*y*) *Metaphysic of Morals*, First Section.

(*z*) *Ibid.*, Second Section.

(*a*) This case is put as a manifest exception by Dr. Johnson. See note (*m*) to § 494, *sup*.

(*b*) See Newman's *Apol.*, p. 349. Cp. Cicero's tribute to the famous act of Regulus in *De Off.* III, 26, and Horace's similar encomium in noble verse (*Carm.* III, 5). This act was an example, if there ever was one, of homage to the Categorical Imperative, and it is surprising that Kant, when casting about for examples of *pure and unadulterated* obedience to duty, which he had some difficulty in finding, did not think of this case, though he does cite Juvenal's "Phalaris licet imperet ut sis falsus, et admoto dictet perjuriam tauro, Summum crede nefas animam præferre pudori Et propter vitam vivendi perdere causas," and says that the poet there gives "such an example" as he is seeking "in a climax, which makes the reader feel vividly the force of the spring that is contained in the pure law of duty, as duty" (*Critique of Pure Practical Reason*, Second Part).

(*c*) *Apol.*, p. 247.

may come," "the end justifies the means," or "to do a great right, do a little wrong." To all such suggestions, the answer of both is that of Portia: "it must not be" (d).

500. From the foregoing review of the doctrines of law and ethics respectively in relation to misrepresentation, one may fairly draw the conclusion that English jurisprudence, at all events in its high modern state of development (e), has never, except for good reasons, lagged behind the ideals of moral philosophy, and that, in language applied to a historian who well merited it (f), it has been "inspired by one unconquered resolve, the aim of securing universally the recognition of the paramountcy of principles over interests, . . . of truth over all forms of evasion or equivocation."

(d) *Merchant of Venice*, Act V, Sc. 1.

(e) In earlier times, no doubt, English law took a somewhat light and cynical view of the duty of veracity, and was inclined to consider the representee to be as punishable for his stupidity, as the representor for his knavery. It was on this theory, presumably, that the old Writ of Deceit did not comprehend ordinary cases of misrepresentation at all: see § 447 in App. A, Sect. 1, Sub-s. (1), and cp. *Anon.* (1684), *Skin.* 159 ("being able to read, it was his own folly,"—a case of a grossly fraudulent transaction). And even at a much later date we find in *Vernon v. Keys* (1812), 4 Taunt. 488, Exch. Ch., a judicial pronouncement which certainly does not display a very exalted morality: "the question is whether the defendant is bound to disclose the highest price he chooses to give, or whether he is not at liberty to do that as a purchaser, which every seller does every day, who tells every falsehood he can to induce a buyer to purchase." This from the Exchequer Chamber!

(f) Lord Acton. The tribute is paid by the editors of his *History of Freedom and other Essays*, in their Introduction, p. xviii.

APPENDIX C.

THE ROMAN LAW OF DOLUS AND MISREPRESENTATION.

501. HAVING regard to the undoubted fact that no small part of the English law of misrepresentation is expressed to be, if not founded on, at least fortified and illustrated by the principles of the Roman jurists in relation to *Dolus*, whilst, as regards the remainder of it, our courts have independently arrived at conclusions which in the main are identical with those of the Digest (*a*), it may be useful and instructive to institute a comparison between the two systems in respect of this department of jurisprudence.

SECT. I. GENERAL VIEW OF THE CONCEPTION OF DOLUS AND ITS PLACE IN ROMAN JURISPRUDENCE.

502. In the *legis actiones* of early Roman jurisprudence there was no *actio doli mali*, or *de dolo malo*, nor was *dolus malus* admitted as an *exceptio*, or plea, to any of the forms of proceeding which in those times could be instituted; though the XII Tables in general terms enjoined good faith *in tutelis*, and afterwards the Lex Plætoria prohibited the *circumscriptio adolescentium* by fraudulent abuse of influence, or other unconscionable means (*b*). It was not until the time of C. Aquilius Gallus, an official colleague, personal friend, and relative of Cicero, that an action on the case for deceit was invented, and made part of the Roman system. In this respect the early history of the English action of Deceit exhibits an almost exact parallel (*c*).

503. The Aquilian Formula is set out in the Digest (*d*), and runs thus: “*Quæ dolo malo facta esse dicentur, si de his rebus alia actio non erit, et justa causa esse videbitur, iudicium dabo.*” The introduction of this form of action was due to Stoical teaching, by which Aquilius, like Cicero, was deeply influenced. The Stoic philosopher Panætius taught Mutius Scævola, under whom both Aquilius and Lucilius Balbus studied. The latter is made responsible for the

(*a*) So called: it should strictly be “Digests,” the title prefixed to the First Book of this collection of extracts from the treatises of jurists being “*Domini Nostri Sacratissimi Principis Justiniani Juris Enucleati ex omni vetere jure collecti Digestorum sive Pandectarum Liber Primus.*” It is curious that, whilst every one speaks correctly of the Pandects, jurists have conspired to use the singular number in the case of its equally plural Latin equivalent. The mode of citing from the Corpus Juris used in the following notes is that now generally used: “D.” stands for “Digest,” and “C.” for “Codex” (Justinian’s collection of Imperial Constitutions, roughly analogous to our statute-law). The first figure after the D., or C., as the case may be, indicates the number of the Book; the second, the number of the Title (or Chapter); the third, that of the section; and the fourth (where there is a fourth), the number of the paragraph or clause or “fragment,” or where the matter cited is in an introductory and unnumbered clause, or “principle,” the abbreviation “pr.” is used.

(*b*) Cic. *De Off.* III, 15. Cp. also *De Nat. Deorum*, II, 30, for a similar summary of the gradual enlargement, by statutes and additions to the Edict, of the juridical view of good and bad faith.

(*c*) See App. A, Sect. 1, Sub-ss. (1) and (2), *ante*.

(*d*) D. 4. 3. 1. 1. Cicero (*De Nat. Deorum*, III, 20) calls his friend’s formula “*everriculum malitiarum omnium.*”

Stoical side of the discussion in Cicero's *De Naturâ Deorum*, and he taught the renowned jurist, Servius Sulpicius. Cicero's *De Officiis*, whether it is to be regarded as a treatise on *officia juris* or *officia virtutis*, on law or ethics (*c*), is saturated with Stoical doctrine, which, through him and others, sank deeply into the fabric of the Digest (*f*) in relation to all departments of the *corpus juris*, but pre-eminently in relation to Dolus. Passing over, for the moment, the exalted but (from the point of view of jurisprudence) somewhat extravagant views of Cicero on this subject, which will receive more detailed consideration presently (*g*), and proceeding at once to the Digest, we find that *dolus malus* is there sometimes used as a *nomen generalissimum* to include not only fraud in its ordinary sense, but all kinds of oppressive, unconscionable, extortionate, or malicious acts, evincing a wicked and deliberate intention to inflict injury, as distinguished from mere negligence and unintentional wrong, just as the term "fraud" was extended by our equity judges in earlier times to cover a similarly miscellaneous collection of transgressions against *æquum et bonum* (*h*). It was never supposed, even in the larger of its two meanings, to include *culpa*, which was its direct antithesis. *Culpa*, however, might be either *levis*, or *magna*, *lata*, *latior*, or *latissima*; and, in more serious degrees, it is frequently spoken of as either equivalent to *dolus* (*i*), or next door to it (*k*).

504. Even in the more restricted interpretation which is put upon the term in the Digest whenever it is used in connection with contracts and transactions induced thereby, *dolus malus* still includes a great deal which would not, with us, be included in the correspondingly more restricted equitable sense of the word "fraud." Thus it includes innocent misrepresentation, non-disclosure, and certain breaches of contract or warranty, as well as ambiguous deliverances, covering up of defects, misrepresentations implied from acts and conduct, and the like. In the passage usually cited for the definition of *dolus malus*, which is taken from Ulpian, *Ad Edictum*, lib. xi, the Aquilian rule is first stated to have been aimed at *dolosi* of all descriptions, with the object of rendering their fraud unprofitable to them, and innocuous to their intended victims (*l*). The rule is then set out (*m*), and the passage proceeds to contrast the definitions of the opposite schools of Servius and Labeo, and to point out that the former is too narrow in one respect and too broad in another, and that the latter is therefore to be preferred, and adopted as law. Labeo's definition is: "every kind of craft, fraud, or covin, used for the purpose of circumventing or deceiving another" (*n*),

(*e*) It has generally been considered a juridical treatise both by Roman lawyers, and by English judges (see Sect. 3, *post*), and English, American, and French writers on legal subjects, *e.g.* Sir Edward Fry (*Specific Performance*), Dr. Story (*Equity Jurisprudence*), and Pothier. In one or two instances, however, Cicero himself admits, and regrets, that he is expounding some purely ethical principle ("lege naturæ sanctitum"), which is not, though it ought to be, positive law. See, for instance, *De Off.* III, 17, the passage cited in note (*e*) to § 495, *ante*, and others.

(*f*) In the very first book of the Digest, Chrysippus, described as "philosophus summæ stoicæ sapientiæ," is cited for his definition of *vóμος* (D. 1. 3. 2).

(*g*) See Sect. 2, Sub-s. (2), *inf.*

(*h*) See §§ 455, 456, *ante*.

(*i*) D. 16. 3. 32 (from Celsus, *Digesta*, lib. xi): "Quod Nerva diceret latiore culpam dolum esse, Proculo displicebat, mihi verissimum videtur. Nam . . . nisi ad suum modum curam in deposito præstat, fraude non caret: nec enim salvâ fide minorem is quam suis rebus diligentiam præstabit."

(*k*) D. 17. 1. 29. pr.: "dissoluta negligentia prope dolum est." This, it will be observed, was the view entertained by many equity lawyers before *Derry v. Peek* (1889), 14 App. Cas. 337, H. L.

(*l*) D. 4. 3. 1. pr.

(*m*) D. 4. 3. 1. 1. See the commencement of § 503, *sup.*

(*n*) D. 4. 3. 1. 2: "Dolum malum Servius quidem ita definiit machinationem quandam alterius decipendi causâ, cum aliud simulatur et aliud agitur. Labeo autem posse et sine simulatione id agi ut quis circumveniat: posse et sine dolo malo aliud agi, aliud simulari, sicubi faciunt, qui per ejusmodi dissimulationem deserviant et tuerentur vel sua vel aliena: itaque ipse sic definiit dolum malum esse *omnem*

—which does not carry matters much further, and is really an almost ludicrous example of a *circulus in definiendo*, since it amounts to no more than this: “fraud is every kind of fraud used for the purpose of defrauding another” (o). It is from other passages scattered about the Digest, where the conception of *dolus* is being applied to concrete cases, that the abstract emptiness of the so-called definition acquires content and meaning, such as the passage which lays down that it may consist both in ambiguous representation and in wilful suppression, in dissimulation as well as simulation (p), and numerous other subordinate propositions, to be noticed hereafter in their proper places (q).

505. The expression *dolus malus* obviously implies the possibility of such a thing as *dolus bonus* (r), or that kind of artifice and stratagem which is rendered by circumstances either justifiable or excusable, as, for instance, when used in defence of a man’s own or another’s property (s) against, or in circumventing, criminals or public enemies (t). Misrepresentation under such conditions would be excusable in English law also (u).

SECT. 2. THE PRINCIPLES OF THE ROMAN LAW OF MISREPRESENTATION COMPARED WITH THOSE OF ENGLISH LAW.

506. It is now proposed to consider, side by side and *seriatim*, the principles and rules of the two systems of jurisprudence, in the same order of topics as that adopted in the Commentary, omitting, of course, all those subjects which, though dealt with in one of the two systems, is ignored by the other.

Sub-sect. (1). As to what is deemed a Representation.

507. It would appear that the Roman law in theory draws the same distinction between statements which induce a contract and those which enter into it, and form part of it, as is drawn in the English system (x), the Digest terming the former *dicta*, and the latter *promissa* (y): though, in the particular application of their rules to various conditions, the distinction is often lost sight of.

508. Statements of intention, *e.g.* an intention to pay (z), or of opinion, whether in the form of advice (a), or in the form of a statement as to the credit of a third person (b) or the value of property (c), and exaggeration and vaunting or *commendatio* (d), are all deemed in the Digest statements of fact, and actionable as

calliditatem, fallaciam, machinationem ad circumveniendum, fallendum, decipiendum alterum adhibitam. Labeonis definitio vera est.”

(o) Dr. Hunter, in his valuable work on Roman Law, characterizes the definition as “neither very precise, nor very accurate.” It certainly is not at all “precise,” but for that very reason is not inaccurate, because the thing to be defined was not precise, and was never otherwise than a concept of the utmost possible generality and comprehensiveness.

(p) D. 18. 1. 43. 2: “Dolum malum a se abesse præstare venditor debet, qui non tantum in eo est, qui fallendi caus obscure loquitur, sed etiam qui insidiosè obscure dissimulat.”

(q) See Sect. 2, *inf.*

(r) D. 4. 3. 1. 3: “Non fuit autem contentus prætor dolum dicere, sed adiecit malum, quoniam veteres dolum etiam bonum dicebant et pro solertia accipiant.”

(s) See note (n), *sup.*: “tuentur vel sua vel aliena.”

(t) D. 4. 3. 1. 4: “si adversus hostem latronemve quis machinetur.”

(u) See § 494, *ante*.

(x) See §§ 20–23 in Ch. II, Sect. 2, Sub-s. (1), and note (d) to § 114, *ante*.

(y) As in D. 4. 3. 37, and D. 21. 1. 19. 3.

(z) D. 47. 2. 43. 3.

(a) D. 50. 17. 47: “consilii non fraudulentum nulla obligatio est: ceterum si dolus et calliditas intercessit, de dolo actio competit.”

(b) D. 4. 3. 8.

(c) D. 4. 3. 9. 1.

(d) D. 4. 3. 37 (if the statement is mere puffery, whether it forms part of the contract, or is preliminary to it, it counts for nothing: but if a real intention to

such if made falsely (which, under the circumstances, must necessarily mean fraudulently also) in the same sense, and within the same limits, as in English law (*e*).

Sub-sect. (2). As to the Elements and Forms of Misrepresentation.

509. *Dolus* being *omnis calliditas, machinatio, fallacia*, it follows that acts of any description to which the above moral qualities may be imputed, and which result in the deception of another, are actionable in Roman law (*f*), just as in our law they may constitute an implied actionable misrepresentation (*g*). Examples abound in the Digest and elsewhere of *dolus* by conduct of the same kind as has formed the subject of English decisions, such as personation (*h*), the use of false weights (*i*), the secret employment of puffers (*k*), "salting," and the like (*l*).

510. As in English law (*m*), a representation is deemed by the Roman jurists to continue until acted upon. For instance, if facts to the knowledge of the representor supervene during the interval between the representation and the representee's alteration of position, such as the destruction by tempest of trees forming part of the description of an estate the subject of sale, the representor must pay damages in an *actio estimatoria* (*n*). On the other hand, a representor is liable according to Roman law, though he would not be so according to the English rule, in the converse case of supervening facts rendering the representation true when acted upon, if it was false and fraudulent when made (*o*), the Roman theory being, apparently, that the representor ought to be punished in any event, *quia dolo fecit, nec dolus purgatur*; whereas our civil jurisprudence aims only at compensation.

511. A studied ambiguity, or ambidexterity, of language, counts against the representor in the one system (*p*), as much as in the other (*q*).

512. Dissimulation is regarded in the Digest as an index, or form, of *dolus*, as much as simulation (*r*), which is the Roman way of expressing the English

deceive is shown, an *actio doli mali* will lie); and D. 21. 1. 19. 3: "ea autem sola dicta sive promissa admittenda sunt quæcunque sic dicuntur ut præstentur, non ut jactentur").

(*e*) See Ch. II, Sects. 2, 3, and 6, *ante*.

(*f*) "Totius injustitiæ," says Cicero (*De Off.* I, 13), "nulla capitalior est quam eorum, qui cum maxime fallunt, id agunt ut viri boni esse videantur."

(*g*) See Ch. III, Sect. 2, *ante*.

(*h*) D. 47. 2. 52. 21 ("cum Titio honesto viro pecuniam credere vellem, subjecisti mihi alium Titium egenum, quasi ille esset locuples"): D. 47. 2. 80. 6 ("falsus procurator . . . nomine . . . veri procuratoris . . . adsumpto").

(*i*) D. 4. 3. 18. 3 ("de eo qui sciens accommodasset pondera").

(*k*) Cic. *De Off.* III, 15: "non illicitatorem venditor, non, qui contra se liceatur, emptor apponet."

(*l*) Such as the fraudulent devices resorted to by Pythius of Syracuse for the purpose of selling his estate, in the story told by Cicero (*De Off.* III, 14), who laments that the law, as it then existed, could not touch the subtle "argentarius," since the Aquilian Formula had not yet been introduced into the Prætorian law.

(*m*) See Ch. IV, Sect. 3, *ante*.

(*n*) D. 18. 6. 9.

(*o*) D. 19. 1. 13. 14 (Titius describes his estate as one of 100 acres, knowing that it contains only 90. Before completion, the missing 10 acres are added to the estate by *alluvio*, or accretion. He is liable, nevertheless, to the purchaser, in an *actio ex empto*).

(*p*) D. 18. 1. 43. 2 ("qui fallendi causâ obscure loquitur").

(*q*) See Ch. IV, Sect. 4, Sub-s. (1), *ante*.

(*r*) D. 18. 1. 43. 2 ("qui insidiosæ et obscure dissimulat"). Cp. Cic. *De Off.* III, 15: "quod si Aquilliana definitio vera est: ex omni vitâ simulatio dissimulatioque tollanda est. Ita nec, ut emat melius, nec ut vendat, quidquam simulabit aut dissimulabit vir bonus."

doctrine that, in certain circumstances and within certain limits, a misrepresentation may be made by silence, omission, suppression, concealment, or inaction (*s*). Most of the illustrations of this type of misrepresentation which are given in the Digest (*t*) correspond very closely with those which form the subject of the English authorities; so also do many of those to be found in the well-known passages in Cicero's treatise where the duty of good faith is discussed (*u*). In many of these passages, however, the jurisconsult is merged in the moral philosopher; and, inspired by Stoicism, Cicero permits himself a wider range, and a more exalted note, than sound legal doctrine, whether Roman or English, can countenance. Thus, whilst acknowledging that mere reticence is not necessarily culpable, as concealment is, he proceeds to define the kind of suppression of facts which, in his opinion, is a breach of good faith, in terms much wider than those of any juridical statement of the duty of disclosure. "Aliud est celare," is the oft-quoted proposition, "aliud tacere; neque enim id est celare, quicquid reticeas; sed quum quod tu scias, id ignorare emolumenti tui causâ velis eos, quorum interit id scire" (*x*). The offence, it will be observed, is complete on proof of the mere failure by the one party to communicate to the other any fact which it is material to the former's interest to conceal, and to the latter's to ascertain. In its literal sense, the proposition is so grotesque, and so inconformable to the principles even of sound ethics (*y*), not to speak of law, that one doubts

(*s*). See Ch. IV, Sect. 4, Sub-s. (2), *ante*.

(*t*) Such as selling a slave with vices, diseased cattle, decayed timber, incumbered land, and the like. See D. 19. 1. 1. 1; D. 19. 1. 4. pr.; D. 19. 1. 6. 9.; D. 19. 1. 13. pr., 1. 2. and 3; D. 19. 1. 21. 1; D. 19. 1. 41; and D. 19. 2. 19. 1. The non-disclosure of any such defects, if known to the vendor and unknown to the purchaser, is *dolus*. Apart from these, there were certain *vitia* the disclosure of which was specially enjoined by the *Ædilician Edict*—see sub-s. (15), *inf.*—which roughly corresponds to such statutory requirements in our law as those contained in the Companies (Consolidation) Act, 1908, s. 81, and other enactments.

(*u*) Cic. *De Off.* III, 12, 13, 16, 23. In the examples given, Cicero admits that there was a difference of opinion among Stoics themselves—Antipater holding in every case the exalted view, and maintaining the inviolable sanctity of what Kant would call the categorical imperative; whilst Diogenes Babylonius, who taught Antipater, confined the rule within the limits of utility, to which he thought that in such matters, the moral law should be, if not subordinate, at least conformable: "in hujusmodi causis aliud Diogeni Babylonio videri solet, magno et gravi Stoico, aliud Antipater, discipulo ejus, homini acutissimo" (III, 12). Cicero obviously inclines to the view of Antipater, which is the essence of pure Stoicism, and often much "too good for human nature's daily food." Diogenes' opinion is usually in accordance with juridical principles. The examples are: (1) sales of land which the vendor knows, but the purchaser and the rest of the world do not know, to be insanitary, or infested with serpents (the English cases relate to a minuter pest), or dilapidated or ruinous or jerry-built (III, 14: *vendat ædes vir bonus propter aliqua vitia quæ ipse novit, ceteri ignorent; pestilentes sint, et habeantur salubres; ignoretur in omnibus cubiculis apparere serpentes; male materiata sint, ruinosa; sed hoc præter dominum nemo sciat. Quæro, si hæc emptoribus venditor non dixerit, ædesque vendiderit pluris multo, quam se venditurum putarit, num id injuste aut improbe fecerit?*); (2) the case of the corn-merchant referred to in the text: see note (*g*), *inf.*; (3) the sale of a house known to the vendors, but not to the purchaser, to have been condemned by the augurs as an obstruction to the taking of the auspices; or the sale of property subject to undisclosed servitudes (III, 16); and (4) the case of wine which is "going off," of slaves given to lying, gambling, thieving, or drunkenness, or of orichalcum as gold (III, 23).

(*x*) *De Off.* III, 13. After the sentence cited in the text he adds, from his copious vocabulary, this rhetorical flourish: "hoc autem celandi genus quale sit, et cujus hominis, quis non videt? Certe non aperti, non simplicis, non ingenui, non justii, non viri boni: versuti potius, obscuro, astuti, fallacis, malitiosi, callidi, veteratoris, vafri. Hæc tot et alia plura, nonne inutile est, vitiorum subire nomina?" He says that Antipater likened such cases to a man's refusal or neglect to put on the right path a wanderer who has lost his way, which in the early days of Athens was an offence punishable by public execration (*ibid.*).

(*y*) See the view of Pothier, in note (*g*), *inf.*

whether Cicero could have intended it to be understood in that sense. But, on examining the context, and the examples he gives, and, above all, his conclusion of the whole matter—that “it is against the law of nature for one man to profit by the ignorance of another” (z)—it is apparent that he did mean the rule he enunciated to be taken *strictissimo sensu*, and without any other qualification than is stated by him. He expressly describes it, however, as a “law of nature”; and therefore it is not perhaps fair to criticize it as if it were put forward as a maxim of jurisprudence, though most writers have so treated it. Regarded in the latter light, it is of course a proper subject of the criticism which has been applied to it by Pothier (a), Grotius (b), Puffendorf (c), Kant (d), Story (e), and Sir Edward Fry (f). Pothier is particularly severe on the “case of conscience” which Cicero puts of the man who takes corn from Alexandria to Rhodes, where there is a famine, and sells it to the Rhodians at famine prices, keeping back from them the fact that, on the voyage, he had passed ships loaded with provisions, making for the famished city, and sails away with his profits before the other vessels arrive (g).

Sub-sect. (3). As to Fraud and Innocence in Misrepresentation.

513. There is no such sharp distinction in Roman, as there is in English, law between fraudulent and innocent misrepresentation (h), for the simple reason that misrepresentation of any kind is not the subject of a distinct title in Roman jurisprudence. For the purposes both of the *actio doli mali*, and the *exceptio doli mali*, something must be proved which amounts to this *dolus malus*. How comprehensive this term is has already been explained (i). It is wide enough to include every sort of misrepresentation, however innocent in the sense of *Derry v. Peek* (k), and every kind of non-disclosure of material facts, even though the party was ignorant of the facts withheld (l). Not only does the Digest (m) agree with the decisions of our courts that to state what is not known to be true is fraudulent (n); but it also adopts the strained view of several equity lawyers (o), that it is a mark of *dolus* or fraud to put forward an unfounded claim, such as to

(z) *De Off.* III, 17: “ex quo intelligitur, quoniam juris natura fons est, hoc secundum naturam esse, neminem id agere, ut ex alterius prædetur insitiâ.”

(a) *De Vente*, pp. 233–242, 297, 298.

(b) *De Jure Belli et Pacis*, lib. ii, ch. 12, s. 9: “non ergo generaliter sequendum illud ejusdem Ciceronis, celare esse, quum quod tu scias, id ignorare emolumenti tui causâ velis eos quorum intersit id scire; sed tum demum id locum habet, quum de iis agitur quæ rem subjectam per se contingunt.”

(c) *Law of Nature*, Book V, Ch. 3, § 4.

(d) *Commentaries*, vol. ii, Lecture 39, pp. 485–491.

(e) *Equity Jurisprudence*, vol. i, § 205.

(f) *Specific Performance*, § 705, in a note to which he cites the above extract from Grotius, and observes that the qualification introduced by the Dutch jurist would probably make the proposition accord with English law.

(g) The case is put in *De Off.* III, 12. Pothier's criticism is in his *De Vente* p. 241, where he says that most writers on the subject regard “la décision de Cicéron” as “outrée,” and he himself thinks that it “souffre beaucoup de difficulté, même dans le for de conscience.”

(h) See Ch. V, *ante*.

(i) § 503, *ante*.

(k) (1889), 14 App. Cas. 337, H. L.

(l) At all events in regard to all those “rehabitory” defects the absence of which was required by the *Ædilician Edict*: see D. 21. 1. 1. 2: “dummodo sciamus venditorem, etiamsi ignoravit ea quæ ædiles præstari jubent, tamen debere tenetur.”

(m) D. 19. 1. 13. 3: “atqui ignoravit: sed non debuit facile quæ ignorabat adseverare . . . non debuit facilis esse ad temerariam indicationem.”

(n) See Ch. V, Sect. 1, Sub-s. (2), *ante*.

(o) See App. A, Sect. 3, *ante*.

insist on retaining a benefit which was obtained by an innocent representation since discovered to be false (*p*).

514. But, though *dolus* characterizes equally all forms of misrepresentation, the Digest continually distinguishes between the character and quantum of the liability, accordingly as it was accompanied by *scientia facti*, or *ignorantia facti* (*q*). This distinction is based on the attitude of Roman jurisprudence towards *dolus*, as something to be punished, rather than, as in English law, something for which the party injured is to be compensated (*r*).

515. Roman law discriminates, as ours does, between the *dolus* which causes *error personæ*, or error as to the substance of the thing which is the subject of the alleged misrepresentation, in which case no contract is created at all, and no property passes, and the *dolus* which induces a contract or transaction by misrepresentations of other kinds, in which case a real contract ensues which passes property, and the *dolus* may, on discovery of the truth, be made the subject of relief and *restitutio* at the instance of the representee (*s*).

Sub-sect. (4). As to the Parties to the Representation.

516. The persons liable for *dolus* in Roman law are much the same as those who are deemed representors in English law (*t*). Thus, whether for the purposes of an action or a plea, it is necessary, and sufficient, to show that the alleged *dolus* was committed either by the person charged, or his principal; and in the latter case the *persona* or character in which the principal is sought to be made liable must be clearly established (*u*). The *scientia* of the "procurator" is, as in our law, the *scientia* of the *dominus* (*x*).

517. The persons entitled to sue for *dolus* are, as in English law, those on whom the *dolus* was practised (*y*), or those who succeed to their general estate (*z*), but not apparently an assignee of the particular subject of the contract or transaction (*a*).

(*p*) D. 44. 4. 2. 5: "dolo facit quicumque id, quod quaquâ exceptione elidi potest, petit; nam et si inter initia nihil dolo malo facit, attamen nunc petendo facit dolose."

(*q*) See generally the illustrations given in the Digest of contracts of sale induced by misrepresentation or concealment of the qualities, skill, or peculium of a slave, or the properties or condition of a house, or chattels, etc.; where, in case of *ignorantia*, the party merely has to make good ("præstare"); but, in case of *scientia*, may be liable in damages ("quanti intersit emptor id scire"), and in some cases double damages ("in duplum").

(*r*) This is the theory, though it is probably erroneous, on which some authorities have contended that the measure of damages in cases of breach of warranty should be larger where the contract-breaker was guilty of fraud, than when he was not: see § 238, *ante*.

(*s*) As to the rule of English law in this matter, see § 259, *ante*. For the similar Roman theory, see D. 47. 2. 52. 21, D. 47. 2. 80. 6, where illustrations are given of cases of personation, which are deemed to constitute *furtum* (larceny), because no contract was intended to be made with the personator, and no property therefore passed, as distinguished from other cases of fraud which are only the subjects of proceedings in *dolus*.

(*t*) See Ch. VIII, Sect. 1, *ante*, for the English law on the subject.

(*u*) D. 44. 4. 2. 1.

(*x*) D. 14. 4. 5. pr. (citing Ulpian, lib. xxix, *ad Edictum*): "procuratoris scientiam et dolum nocere debere domino neque Pomponius dubitat nec nos dubitamus."

(*y*) See Ch. VIII, Sect. 2, *ante*. The Digest has no references to the questions of transmitted representation which have occupied so much judicial attention in our courts: see §§ 177, 178, 179, *ante*.

(*z*) D. 21. 1. 19. 5 ("successoribus ejus, qui in universum jus succedunt").

(*a*) In our law, a mere right to sue for damages for fraud is not assignable: see Ch. X, Sect. 5, Sub-s. (1), *ante*. But a right of rescission may pass with the property forming the subject of a contract induced by misrepresentation: see Ch. XI, Sect. 6, Sub-s. (1), *ante*.

Sub-sect. (5). As to the Rights of Contribution and Indemnity.

518. Roman jurisprudence "recognizes contribution where there is a civil wrong" (*b*). Here the English system, which still denies a right of contribution or indemnity to tortfeasors, differs (*c*). Scots law, in this, as in other respects (*d*), follows the Roman.

Sub-sect. (6). As to Burden of Proof.

519. The Digest does not discuss those nice and difficult questions of the burden of proof with which English law has been so much concerned (*e*), though of course the general principle, *ei incumbit probatio qui dicit, non qui negat*, runs through the entire Roman system. In regard to *dolus* in particular, there is an imperial Constitution requiring, as English law requires, the utmost strictness of proof (*f*).

Sub-sect. (7). As to Alteration of Position and Damage.

520. Here the Digest is not quite so precise and detailed as English law (*g*), and, as above indicated, its rules differ from ours in certain respects, by reason of the quasi-criminal character attached to *dolus* by the Roman jurists, which led them rather to concern themselves with the question of how to penalize the offender, than how to recompense and reinstate his victim, and to devise a scheme of pecuniary punishments graduated according to the degree of guilt which accompanied the *dolus*, rather than according to the loss which it inflicted (*h*).

Sub-sect. (8). As to how far the Representee's Knowledge is a Defence.

521. The proved knowledge of the representee is a good affirmative plea to a proceeding founded on *dolus* (*i*), as it is to a proceeding in English law founded on misrepresentation (*k*). But Roman law also attached importance to means of knowledge, as distinguished from actual knowledge; that is to say, it inferred the latter in some cases from the mere existence of the former, an inference which our courts, except perhaps as regards patent defects—so patent as to be glaring—in "objects of sense," refuse to draw (*l*). In the case of the representee,

(*b*) This was so stated by eminent Scottish advocates (and not disputed on the other side, or by any of the law Lords), at p. 320 of *Palmer v. Wick and Pulleneytown Steam Shipping Co.*, [1894] A. C. 318, H. L., but the references given in the report (to D. 9. 3. 1. and D. 27. 3. 13. 14) are incorrect. I have not been able to discover the passages intended to be referred to.

(*c*) See Ch. VIII, Sect. 1, Sub-s. (6), *ante*.

(*d*) See App. D, generally, *post*.

(*e*) See Ch. X, Sect. 1, and Ch. XI, Sect. 2, *ante*.

(*f*) C. 2. 20 (or 21). 6: "Dolum perspicuis insidiis"—Pothier on Obligations cites this as "indiciis," which was perhaps the word intended—"probari convenit."

(*g*) See Ch. VII, Ch. X, Sect. 3, and Ch. XI, Sect. 3, *ante*.

(*h*) See Sub-s. (15), *inf*. In one case, indeed, it is said that the *dolosus* must suffer for his intention to deceive, though the intention is unaccomplished: see § 510, and note (*n*) thereto, *ante*, citing D. 19. 1. 13. 14.

(*i*) D. 19. 1. 1. 1: "non videtur esse celatus qui scit, neque certiorari debuit qui non ignoravit."

(*k*) Ch. X, Sect. 2, Sub-s. (1), *ante*.

(*l*) As to "objects of sense," cp. the cases cited in note (*l*) to § 209, *ante*, with D. 18. 1. 43. pr. (a representation that a slave is good-looking, or a house well built, is a statement the untruth of which, if it is untrue, *palam apparet*, and must be known to the *emptor*:—English law would not agree as to the house, though it might as to the slave:—but, where the statement is that a slave is learned, or skilled in some art, no knowledge can be imputed to the purchaser: cp. Plato, *Legg.* xi, 916, 917, where it is said that knowledge of a defect in a slave, such as epilepsy, will be imputed

as in that of the representor, the knowledge of the *procurator* is imputed to the *dominus*. Here, again, there is a difference between the two systems (*m*).

Sub-sect. (9). As to how far an Express Contract to waive Inquiry, etc., is a Defence.

522. The rule that an express engagement by the representee to take the subject of a contract with all faults, or at all risks, or to waive inquiry or investigation, or to put up with a refusal to warrant, constitutes a defence (*n*), is common to both systems. So also is the countervailing rule that the defence is destroyed by proof of fraudulent devices on the part of the representor for the purpose of covering up or hiding away any particular defects or risks or facts (*o*).

Sub-sect. (10). As to Sales by Authority of the State.

523. In Roman law, sales by the authority of the State were impeachable for fraud, if the party would not have purchased *at any price*, had he known the truth; but not otherwise (*p*). In English law, sales by the direction of the courts are impeachable for misrepresentation in precisely the same way as any other sale (*q*).

Sub-sect. (11). As to Agreements excluding Liability for Fraud.

524. All such agreements were invalid in Roman law (*r*), as they probably also are in our law (*s*). For the same reason an express stipulation for good faith is stated in the Digest to be unnecessary and nugatory (*t*).

Sub-sect. (12). As to Specific Restitution.

525. The rules stated in the Digest as to specific restitution in cases of sale, are, first, that where it is the vendor's fault that the purchaser cannot give back what he received, the inability to restore constitutes no defence to the *actio redhibitoria* (action for rescission); secondly, that, where neither party is in fault,

to an expert representee such as a physician or trainer, but not to a layman); D. 18. 1. 43. 1. (sale of a slave *luminibus effossis*, as sound, cannot deceive the purchaser: this is like the case of the one-eyed man in *Bawden v. London Edinburgh and Glasgow Assurance Co.*, cited in the above-mentioned note to § 209); D. 21. 1. 1 (patent blemishes); D. 21. 1. 14. 10 (the like, as to a visible scar or blindness). The Roman law, herein going further than the English, imputes knowledge to a party who has taken no trouble to acquire it: D. 18. 1. 15. 1 ("ignorantia emptori prodest quæ non in supinum hominem cadit"); and D. 22. 6. 9. 2 ("facti ignorantia ita demum cuique non nocet, si non ei summa negligentia objiciatur . . . recte Labeo definit scientiam neque curiosissimi neque negligentissimi hominis accipiendam").

(*m*) D. 21. 1. 51.

(*n*) Cp. Ch. X, Sect. 2, Sub-s. (2), *ante*, with D. 19. 1. 1. 1 (where the case is put of a man who, on selling a house, says, "so far as I know the property is not subject to any servitudes, but I wish to protect myself against any unknown servitude being hereafter discovered": here, if he knows of no servitude, the condition protects him: if he does know of any, and is concealing it, the condition is no defence); D. 19. 1. 6. 9; and D. 19. 1. 13. 6. In French law (see Civil Code, Article 1643) the vendor is not liable for hidden defects if he expressly refuses to give a warranty.

(*o*) See Ch. X, Sect. 2, Sub-s. (2), *ante*, and compare D. 19. 1. 1. 1 (cited in the last note), and D. 21. 1. 14. 9 (to an *exceptio pacti*, that is, a plea founded on an express agreement, a proved concealment is a good subject of a *replicatio doli mali*).

(*p*) D. 21. 1. 1. 3. In French law (Code Civil, Article 1649) no action for rescission will lie "dans les ventes faites par autorité de justice."

(*q*) Ch. XI, Sect. 3, Sub-s. (5), *ante*.

(*r*) D. 2. 14. 27. 3; D. 13. 6. 17. pr.; D. 50. 17. 23.

(*s*) See § 297, *ante*.

(*t*) D. 18. 1. 68. 1.

the like result follows; but, thirdly, if it is the purchaser's fault entirely, as, for instance, if he has manumitted the slave who, or deliberately alienated the thing which, passed under the contract, there is a good defence both to any proceedings for redhibition, and to any action *quantum minoris* (sc. for damages), and *a fortiori* to any *actio duplex* (u). The first and third rules are the same as in English law (x). The third rule, indeed, points to what in our courts would be regarded also as a case of affirmation (y). The second rule is not in accordance with the English decisions (z).

Sub-sect. (13). As to Setting off one Fraud against another.

526. Roman law does not permit this course to be adopted (a), nor does English; though, in one curious case, the decision seems to be founded on some such theory (b).

Sub-sect. (14). As to Misrepresentation to Public Authorities whereby Grants, etc., are obtained.

527. Certain imperial Constitutions provided that any grant of privileges or benefits made by an officer of State, or a public department, if shown to have been obtained by deceptive statements, might be revoked (c). Grants from the Crown are, under the like conditions, revocable in English law (d).

Sub-sect. (15). As to Remedies and Relief.

528. Originally Roman jurisprudence admitted neither of an *actio* nor an *exceptio* founded on *dolus malus*. In later times the Prætor introduced formulas for both. It is convenient to consider these in order.

529. First, as to the *actio*. The history and form of the Aquilian Formula has already been given (e). The Roman jurists recognized that, since the charge of *dolus* was a grave one, and involved *infamia*, if proved, it ought not to be lightly brought, and that indiscriminate resort to the *actio* was not desirable. Hence it was only allowed *si alia actio non erit* (f), just as, in the earlier history of the English action of deceit, it was resolved that the action would not lie if there was any other remedy (g). And, even where the *actio* could not have been refused, if insisted on, a practice was introduced and encouraged of moulding the issues *in factum*, so as to avoid the use of the word *dolus* altogether (h).

530. The general nature of the remedy given in any action founded on *dolus* was restoration of the parties in one form or another to their former position. This, too, is the principle governing the English forms of action. The party who procured a contract by *dolus* was compelled to "make good" (*præstare*); sometimes in one sense of the word, that is, to make good the other party's loss, sometimes, in the other sense, viz. to make good his own representation. The former type of relief included rescission (*actio redhibitoria*) and compensation (*actio quantum minoris* or *æstimatoria*), which are the two main species of relief granted

(u) For the third rule, see D. 21. 1. 47. pr. For illustrations of the other two, see D. 21. 1, *passim*.

(x) See Ch. XI, Sect. 4, Sub-s. (5), *ante*.

(y) *Ibid.*, Sub-s. (4), *ante*.

(z) *Ibid.*, Sub-s. (5), *ante*.

(a) D. 44. 4. 13 (a *replicatio doli* is not pleadable to an *exceptio doli*).

(b) See § 340, *ante*, and note (f) thereto.

(c) C. 1. 22. 2, 3, 4, 5.

(d) See Ch. XIV, Sect. 1, Sub-s. (4), *ante*.

(e) *Vid. sup.*, §§ 502, 503.

(f) D. 4. 3. 1. 4.

(g) See Com. Dig., Action on the Case for a Deceit, E. 5.

(h) It has been shown that, in our law, it is quite unnecessary to use the word "fraud": see § 463, *ante*.

in our jurisprudence (*i*). On the other hand, English law, as has already been shown (*k*), does not now, if it ever did, require the representor to make good his representation, in the sense of performing the contract as if the representation were a promise forming part of it.

531. The *actio redhibitoria* was the outcome of the *Ædilician Edict* (*l*), which required the disclosure of certain facts and defects (*vitia*) in contracts of sale in the market. These, at first, very limited requirements—limited both as to the subject-matters of the contract, and as to the “redhibitory” defects—were gradually extended so as to embrace nearly every kind of property, and most of the ordinary defects (*m*). The action was so called because the seller was thereby forced to take back what he had before, which implied an undoing or annulment of the sale: “redhibere est facere, ut rursus habeat venditor quod habuerit” (*n*).

532. Where the *vitium* in question was not one of those contemplated by the Edict, that is to say, was not “redhibitory,” it was the subject of an *actio ex empto* by the purchaser for damages (*o*); the measure of such damages being the measure adopted in English law in cases of breach of warranty, viz. the difference between the value of the thing delivered and the value which it would have had if it had answered to the representation (*p*), except in some cases of *scientia*, or fraud, where the vendor might be ordered to pay double the amount of the difference (*q*). This form of proceeding was also called, or rather the same result was arrived at by, an *actio aestimatoria*, or *quantum minoris* (*r*). Notwithstanding that the primary object of the action was compensation, the *judex*, in certain cases (as, for instance, when the *mancipium* or subject of the sale was entirely valueless) was empowered to grant redhibitory relief, that is to say, to order the return of the whole price on restoration of the articles (*s*).

533. The formula used to raise an *exceptio doli mali* was as follows: “Si paret Numerium Negidium Aulo Agerio . . . dare [facere] oportere, si in eâ re nihil dolo malo Auli Agerii factum est, neque fiat, condemnna. Si non paret, absolvito” (*t*). It is evident from the above that, as in English law, the burden of establishing this affirmative plea was on the defendant; also that (herein differing from our law) the Roman jurists considered the plea established by proof that the fraud existed at any time down to the trial (*u*), and not merely as an inducement to the contract or transaction in question. Redhibitory relief or damages, in a proper case, could be granted to a defendant setting up the plea, which means that every such plea was deemed to involve a counter-claim.

534. Whatever was sufficient to support the *actio*, was sufficient to support

(*i*) See Chs. X and XI, respectively, *ante*.

(*k*) See Ch. IX, Sect. 3, Sub-s. (1), *ante*.

(*l*) Set out in D. 21. 1. 1. 1.

(*m*) For the history and development of the principles introduced by this Edict, and for illustrations of their application, see Cicero, *De Off.* III, 16, 17, and D. 21. 1 (De *Ædilio Edicto et Redhibitione et Quantum Minoris*), generally.

(*n*) D. 21. 1. 21. pr. Ulpian, from whose Commentary on the *Ædilician Edict* this passage is extracted in the Digest, adds (with philological inaccuracy, but juridical soundness) “quia reddendo id fiebat, idcirco redhibitio est appellata, quasi redditio.”

(*o*) D. 21. 1. 4. pr.

(*p*) D. 19. 1. 1. pr. The damages are “quantum emptoris interfuit non decipi,” or “quod rem habere interest emptoris.” For illustrations, see D. 19. 1 (De *Actionibus Empti Venditi*), *passim*.

(*q*) Illustrations are frequent in the Digest. It is difficult to deduce from them any principle on which the award of double damages is, or is not, to be made.

(*r*) These were two different names for one and the same action: D. 21. 1. 43. 6.

(*s*) D. 21. 1. 43. 6.

(*t*) For illustrations, see generally D. 44. 4 (De *Doli Mali et Metus Exceptione*), *passim*. Cp. Ch. XII (Misrepresentation as a Defence), *ante*, for the English law which, except as stated in the text, is precisely the same as the Roman.

(*u*) D. 44. 4. 2. 3.

the *exceptio doli mali* (x). The same principles applied to each form of proceeding. Consequently the *exceptio*, like the *actio* (y), and for the same reason, viz. that it was *famosa*, was frequently raised by a statement in *factum*. The fraud to be established was the fraud of the *actor* or plaintiff, or of some person for whose acts he was responsible, and not the fraud of a third person (z).

535. In the case of all actions *bonæ fidei*, as opposed to actions *stricti juris* no *exceptio doli mali* was required; because the action itself involved a consideration by the *judex* of whether good faith had been observed or not by both, or either, of the parties, the formula being: *quicquid paret dare (facere) oportere ex fide bonâ*, etc. As in the case of the equitable form of proceeding introduced by Lord MANSFIELD, known as the action for money had and received (a), the utmost latitude was permitted both to the "actor" in formulating his equitable claims, and to the *reus* in resisting them on equitable grounds. The principles of *æquum et bonum* could be invoked on either side. Not only *dolus*, but usage, and set-off, could be raised by the defendant or plaintiff, without any special *exceptio* or *replacatio*, and the *judex* had ample authority to do what was right between the parties, entertain cross-claims, order reduction of prices, strike a balance (*deductio* or *compensatio*), and give effect to equities all round. The actions which were deemed *bonæ fidei* comprised not only those which were concerned with such fiduciary relations and transactions as English equity considers the subject of special obligations of disclosure, but also others, such as contracts of purchase and sale, hiring, and the like. Cicero traces shortly the introduction and gradual enlargement of this class of action, where it was not only permissible, but essential, to investigate the good faith or *dolus* of the parties (b), and says that these conditions exist "in tutelis, societatis, fiduciis, mandatis, rebus emptis venditis, locatis conductis," and that proceedings relating to any of these contracts or transactions are all *bonæ fidei* (c); to which may be added, *gestio negotii*, *depositum*, *familiæ erescundæ*, and *communi dividundo*.

536. In a criminal aspect the obtaining of advantages by false pretences, if not the subject of any express *judicium*, was considered to amount to the offence of *stellionatus* (d). This crime stood to the offence of *furtum* in the same sort of relation as that in which our "false pretences" stands to larceny by a trick or otherwise. That is to say, just as in our jurisprudence, a fraudulent misrepresentation, whether in words or by acts and conduct, would support either an action for damages or (where money or goods are obtained thereby) an indictment for obtaining money, etc., by false pretences, so, in Roman law, similar conduct would expose the party either to an *actio doli mali*, or to a charge of *stellionatus* (e).

(x) "Palam est autem hanc exceptionem ex eadem causâ propositam, ex quâ causâ proposita est de dolo malo actio": D. 44. 4. 2. pr.

(y) See § 529, *sup*.

(z) D. 44. 4. 2. 1.

(a) See the description of the nature, and fairness and convenience, of this form of action which is given by Lord MANSFIELD, C.J., himself at p. 1012 of *Moses v. Macferlan* (1760), 2 Burr. 1005.

(b) See Cic. De Off. III, 17, with which compare a similar summary in his *De Naturâ Deorum*, II, 30.

(c) Cic. De Off. III, 17.

(d) "Stellio," literally a kind of newt with speckled back ("stella"), and mentioned by Virgil as one of the insects which eat away honeycombs ("sæpe favos ignotus adedit Stellio," Georg. iv, 243), was afterwards used in a secondary sense to designate a rogue or swindler. "Stellionatus," therefore, means swindling or roguery, and answers to the common law English offence of cheating. In the impeachment of the Duke of Buckingham, Sir John Eliot charged the Duke with "stellionatus," and it was, no doubt, the low and vulgar associations of the name which moved the special wrath and resentment of Charles I's favourite. The offence is described, and illustrated by examples, in D. 37. 20 (Stellionatus), and further illustrated in D. 13. 7. 36; D. 17. 1. 29. 5; and C. 9. 34.

(e) D. 37. 20. 3. 1: "stellionatum objici posse his, qui dolo quid fecerunt, sciendum est, scilicet si aliud crimen non est quod objiciatur; quod enim in privatis judiciis est de dolo actio, hoc in criminitus stellionatus persecutio."

If no property was intended to pass at all, the offence would be *furtum* in the case, and larceny in the other (*f*).

SECT. 3. APPLICATIONS OF, AND REFERENCES TO, THE PRINCIPLES OF THE ROMAN LAW OF *DOLUS* IN ENGLISH JUDGMENTS.

537. The references to Cicero and the Digest in the judicial deliverances of our courts on questions of misrepresentation are not infrequent or unimportant. In most of these, the principles of Roman jurisprudence are appealed to in support of the existing rules of English law; but, in one or two cases, they are drawn in aid of the individual judge's personal predilections in favour of an extension of those rules (*g*). The words, and even the substance, of the matters referred to are sometimes inaccurately reproduced; and, still more frequently the book, title, section, and fragment of the Digest given by the reporters in the notes are not to be relied on, and the famous counsel given by the venerable scholar leaving life to one who was just entering upon it—"always verify your references"—has been sadly neglected (*h*). The topics in reference to which the most frequent allusions are made to the views of Roman jurists are the following: the definitions, in Cicero and the Digest, of *dolus malus*, its characteristics and incident the rule of *æquum et bonum*; the duty of disclosure, and the difference between *celare* and *tacere*; the employment of puffers at auction sales; and the imputation of knowledge of falsity to the representor, or knowledge of the truth to the representee (*i*).

538. The definition and examples of *dolus malus* found in Cicero and the Digest, as already cited (*k*), are referred to by Lord HARDWICKE (*l*), by KNIGHT BRUCE, V.-C. (*m*); and by SHEE, J. (*n*), in important judgments; as also by Sir S. ROMILLY (*o*), and Serjeant Best (*p*), in their arguments of other, and in

(*f*) D. 13. 7. 36.

(*g*) As, for instance, Lord MANSFIELD, C.J.—see notes (*a*), and (*b*), *inf.*, and SHEE, J.—see notes (*n*), and (*x*), *inf.*

(*h*) See, for illustrations, several of the notes to the remainder of this Section, in some instances, the hash made of sense, syntax, and words, is so deplorable: to call to one's mind, if not to justify, the doggerel verses once addressed by the Oxford civilians to the law-courts—

“ In Institutis,
Comparo vos brutis :
In Digestis,
Nihil potestis :
In Codice,
Satis modicè :
In Novellis,
Similes asellis.”

(*i*) See the next four paragraphs, for reference to these topics respectively.

(*k*) See § 504, *sup.*, and particularly note (*n*) thereto.

(*l*) In *Le Neve v. Le Neve* (1747), Ambler 436, 445, 1 Ves. 64, 68, 3 Atk. 646, 656, 655 (a case of constructive notice: in the report in Ambler havoc is made of the spelling of some of the words cited).

(*m*) At p. 109 of *Stikeman v. Dawson* (1847), 1 De G. & Sm. 90 (where the reference is given as D. 4. 3. 12, instead of, as it should be, D. 4. 3. 1. 2.).

(*n*) At p. 496 of *Lee v. Jones* (1864), 17 C. B. (N. S.) 482, Exch. Ch., where, in a suretyship case, he gives a translation of D. 18. 1. 43. 2 (which the reporter incorrectly cited as D. 43. 2), and relies upon this passage to support his views of the duties of disclosure in a suretyship case, which, perhaps, went further than sound principles of warrants, or than the other members of the court cared to go. At p. 502 he cites D. 17. 1. 29 (“*dissoluta negligentia prope dolum est*”), which is a doubtful proposition in English law.

(*o*) In *Huguenin v. Baseley* (1807), 14 Ves. 273, 9 R. R. 276, he cites the passage from Cic. De Off. 1, 13, set out in note (*f*) to § 509, *ante*. This is, says Sir F. Pollock (at p. vi of his Preface to 9 R. R.), “perhaps the only modern case in which a reported argument has acquired by later judicial approval an authority equal to that of the judgment itself.”

(*p*) In a case to which I have lost the reference, where Serj. Best cited the “disimulation” passage in D. 18. 1. 43. 2—see note (*r*) to § 512, *ante*—a reference which

less, important cases; whilst the duty of good faith, and the observance of *equum et bonum*, as enunciated by the Roman jurists, is relied upon by Lord MANSFIELD, C.J., in justification of the equitable action for money had and received which, under his auspices, was adopted into the English law (*q*).

539. The Ciceronian view of the distinction between innocent silence and culpable concealment (*r*) is cited freely in many of the authorities; notably by Lord MANSFIELD, C.J. (*s*), Lord ABINGER, C.B. (*t*), KNIGHT-BRUCE, V.-C. (*u*), SHEE, J. (*x*), and CHITTY, J. (*y*).

540. The passage in Cicero as to the secret employment of bidders at auction sales (*z*) was the foundation of Lord MANSFIELD's decisions on this topic (*a*), and is cited at a later date by BYLES, J., in dealing with the same question (*b*).

541. The rules of the Digest as to the knowledge which should be imputed to the representee, and which is deemed sufficient to defeat any suggestion that he was deceived (*c*), are relied upon by KNIGHT-BRUCE, V.-C. (*d*); whilst the Roman rule whereby the knowledge and *dolus* of the agent is imputed to the principal, is cited by JERVIS, C.J. (*e*). Certain statements in the Digest as to the

the reporter misheard or misread for D. 4. 3. 2, and remarked that he could not find the passage there, which is not surprising: "the Spanish fleet thou canst not see Because 'tis not in sight." Either Serj. Best, or the reporter, probably the former, cited the words inaccurately, and inverted the order of the sentences. In *Atwood v. Small* (1838), 6 Cl. & Fin. 232, Lord BROUGHAM, at pp. 444, 445, says that "*dolus dans locum contractui*" is the language of the civil law, and not "*dolus malus*" merely, which, in that general and unqualified form, is an incorrect statement. In *Trigge v. Lavallo* (1863), 11 W. R. 404, P. C., the old French Canadian law of "*dol*" (or the Roman "*dolus*") was discussed.

(*q*) See *Moses v. Macferlan* (1760), 2 Burr. 1005, at p. 1011.

(*r*) See § 512. *ante*, and, particularly the "*aliud est celare*" passage from Cic. De Off. III, 13, which is there set out.

(*s*) At p. 1910 of *Carter v. Boehm* (1764), 3 Burr. 1905.

(*t*) At pp. 380, 381 of *Cornfoot v. Fowke* (1840), 6 M. & W. 358, where, after citing the illustrations given by Cicero as to concealment of defects in a house offered for sale—see note (*u*) to § 512, *ante*,—Lord ABINGER proceeds: "he" (Cicero) "then gives the arguments on both sides, and concludes that the vendor ought not to have concealed the defect in the house from the buyer." The "*aliud est celare*" passage is next cited, and Lord ABINGER adds: "then this illustrious moralist gives his own opinion of the moral turpitude of such a concealment. '*Hoc autem celandi genus*,'" etc.: see note (*x*) to § 512, *ante*. The "illustrious moralist," it is to be feared, was leading the illustrious judge over somewhat treacherous ground in the course of this discussion.

(*u*) At p. 571 of *Gibson v. D'Este* (1843), 2 Y. & C. (CH.) 542.

(*x*) At pp. 495 and 498, of *Lee v. Jones* (1864), 17 C. B. (N. S.) 482, Exch. Ch. As to the views there expressed somewhat transcending the limits of the English rule, see note (*g*), *sup*.

(*y*) At pp. 208, 209 of *Turner v. Green*, [1895] 2 Ch. 205.

(*z*) Cited in note (*m*) to § 509, *ante*.

(*a*) See § 392 in Ch. XIII, Sect. 2, Sub-s. (2), *ante*, and note (*y*) thereto. Lord ELDON, L.C., though agreeing with these decisions, thought that, following, as they did, the doctrines of Stoical ethics, some of Lord MANSFIELD's *dicta* went too far: see *Conolly v. Parsons* (1797), 3 Ves. 625 n.

(*b*) At p. 208 of *Green v. Baverstock* (1863), 14 C. B. (N. S.) 204. Instead of "*qui contra se liceatur*," the words cited are "*qui contra asse liceatur*," which makes nonsense of the passage. BYLES, J., as Sir J. BYLES, had previously cited it correctly in his argument at p. 368 of *Thornett v. Haines* (1846), 15 M. & W. 367, as "the rule of ethics laid down by Cicero," on which "this doctrine of our law is founded," adding that, on these questions, "Lord MANSFIELD followed the rule of the civil law."

(*c*) See § 521, *ante*.

(*d*) At p. 687 of *Reynell v. Sprye* (1852), 1 De G. M. & G. 660, evidently having in mind D. 22. 6. 9. 2, though the words he cites,—"qui vult decipi, decipiatur"—are not to be found,—in this passage at any rate.

(*e*) At p. 108 of *Coleman v. Riches* (1855), 16 C. B. 104, citing D. 14. 4. 5. pr., the passage set out in note (*x*) to § 516, *ante*, but the spelling and syntax are hopelessly inaccurate: "procuratiōis" being substituted for "procuratoris," and "dominus"

materiality of representations relating to the *conditio* or *status* of a person as used by KNIGHT-BRUCE, V.-C., to illustrate his views as to the materiality of a infant's misrepresentation of having attained his majority (*f*).

for "dominum." As to the Roman view of the knowledge which should be impute to a *representor*, KNIGHT-BRUCE, V.-C., at p. 106 of *Stikeman v. Dawson*, (1847), 1 D G. & Sm. 90, cites the passage from the Digest which bears on this question.

(*f*) At p. 107 of *Stikeman v. Dawson, sup.*, where he appends to his citation the remark—"I am not satisfied that, as a general rule, the law of England dissents."

APPENDIX D.

THE SCOTTISH LAW OF MISREPRESENTATION.

542. THE Scots law, in the department of misrepresentation, as in most others, follows the Roman system. The result is that in substance (*a*), its principles differ very little from those of English law, which also coincide in the main with, and in some cases even purport to be derived from, the doctrines of the Digest (*b*). Where such differences exist (*c*), it will generally be acknowledged that the Scottish rule is the more logical and just of the two (*d*). It is proposed now to compare very briefly the two systems in relation to (1) the action for damages, (2) proceedings for rescission, (3) statutory provisions, and (4) pleading and procedure (*e*).

SECT. 1. AS REGARDS RELIEF BY WAY OF DAMAGES ("REPARATIO DAMNI").

543. With reference to the action for damages for fraudulent misrepresentation (*reparatio damni*), the rules of the two systems are identical, and relief is granted or refused in the Scottish Courts on precisely the same principles as it

(*a*) See, generally, Bell's *Principles of the Law of Scotland*, (9th edn.) §§ 13, 13A. There are great differences, however, in terminology between the two systems, for Scots law has always adopted a special and highly technical system of nomenclature, which, though sometimes provoking the derision of unreflecting persons, presents this enormous advantage that it tends to accuracy in definition, which means precision in thought, whereas the English practice of drawing upon, and deferring to, popular language tends to promote confusion. On this topic, see App. A, Sect. 5, Sub-s. (1), *ante*.

(*b*) See App. C, Sect. 3, *ante*.

(*c*) These differences—they are very few—are noted in their proper places below.

(*d*) Lord Cockburn is not without justification, when, in his *Life of Lord Jeffrey*, he boldly asserts that "with a little deduction on account of the feudality which naturally adheres to real property, it is perhaps the best and the simplest system in Europe. It is deeply founded on practical reason, aided by that conjoined equity which is equity to the world, as well as to lawyers. There can be no more striking testimony to its excellence than the fact, that most of the modern improvements in English law, on matters already settled in the law of Scotland, have amounted, in substance, to unacknowledged introductions of the Scotch system." This "striking testimony" has been added to since Lord Cockburn's time. For instance, in the Sale of Goods Act, 1893, the legislature deliberately chose the Scotch rules in preference to the English, where there was a discrepancy between them, as the rules which were to govern the sale of goods in the whole of the United Kingdom. One reason of the greater logicity and simplicity of Scotch jurisprudence is that, following the Prætorian (which was equitable) law, it never had any occasion to establish or recognize a pair of parallel and conflicting set of rules, as in England, or to hamper themselves with such absurd distinctions as that, for instance, between "legal" and "equitable" fraud, or between "legal" and "equitable" estoppel, and the like, which once flourished so amazingly, and so persistently, in our courts.

(*e*) See the four Sub-sections, respectively, of this Appendix.

is granted or refused in ours (*f*), with these two exceptions: first, that the rule of no contribution between tortfeasors is not recognized in Scotland (*g*), and secondly, that the estate of a deceased representor is in Scotland liable to the representee for the deceased's fraudulent misrepresentation, if there are assets, or sufficient assets (*h*), whereas, as has been pointed out, in England there is no such liability, unless a specific fund or property acquired by means of the misrepresentation can be traced, identified, earmarked, and segregated from the deceased's general estate (*i*).

SECT. 2. AS REGARDS RELIEF BY WAY OF RESCISSION ("REDUCTION") AND DEFENCE.

544. By the law of Scotland, a contract may be rescinded ("reduced"), and the parties restored ("reponed") to their former position (*k*), or money had and received ("repetition") may be brought (*l*) for misrepresentation, under precisely the same conditions, and subject to the same rules, and on adducing the same proof, as in our courts. Moreover, both systems allow such misrepresentation to be set up as a defence to any action or proceeding for the purpose of directly or indirectly enforcing the contract (*m*).

SECT. 3. AS REGARDS STATUTORY PROVISIONS.

545. Most of the statutes relating to misrepresentation, or authorizing forms of proceeding and relief which may be founded on it, apply (with such variations as may be required in each case) to Scotland; for instance, the various Companies Acts (*n*); the Factors Act, 1889 (*o*), and the Sale of Goods Act, 1893. The Statute of Frauds Amendment Act, 1828, s. 6, does not extend to Scotland, but a section to the same effect with one important exception, but much more clearly worded, sect. 6 of the Mercantile Law Amendment (Scotland) Act, 1856 (19 & 20 Vict. c. 60), was subsequently passed (*p*). The Sale of Land by Auction Act,

(*f*) See *Davidson v. Tulloch* (1860), 3 Macq. H. L. 783; *Phosphate Sewage Co. v. Molleson* (1876), 1 App. Cas. 780, H. L.; *Houldsworth v. City of Glasgow Bank* (1880), 5 App. Cas. 317, H. L.; *Chr. Salpensen & Co. v. Rederi Aktieselskabet Nordstjernen*, [1905] A. C. 302, H. L.; and *Boyd and Forrest v. Glasgow and S. W. Railway Co.*, [1911] Sc. Ct. of Sess. Cas. 33.

(*g*) *Palmer v. Wick and Pullenvytown Shipping Co.*, [1894] A. C. 318, H. L. For the English rule, see Ch. VIII, Sect. 1, Sub-s. (6), *ante*.

(*h*) *Davidson v. Tulloch*, *sup.*, per Lord CAMPBELL, L.C., at pp. 790, 791, Lord BROUGHAM at p. 795, and Lord CRANWORTH at pp. 795, 796. Here Scots law follows the common, in preference to the Roman, law: see Bell's *Principles*, § 546.

(*i*) See Ch. X, Sect. 5, Sub-s. (2), *ante*.

(*k*) See *Burnes v. Pennell* (1849), 2 H. L. C. 497; *Davidson v. Tulloch*, *sup.*, *Tennent v. City of Glasgow Bank* (1874), 4 App. Cas. 615, H. L.; *Stewart v. Kennedy* (1890), 15 App. Cas. 108, H. L.; *Edinburgh United Breweries, Ltd. v. Molleson*, [1894] A. C. 96, H. L.; *Life and Health Assurance Association v. Yule* (1904), 6 F. 437; *Ferguson v. Wilson* (1904), 6 F. 779; *Watts v. Assets Co.*, [1905] A. C. 317, H. L.; and *A. W. Gamage, Ltd. v. Charlesworth*, [1910] Sc. Ct. of Sess. Cas. 257.

(*l*) *Brownlie v. Campbell* (1880), 5 App. Cas. 925, H. L. was a case of this kind. See on "repetition," which was the Roman "condictio indebiti," Bell's *Principles*, §§ 531-535.

(*m*) See *Smith v. Bank of Scotland* (1813), 1 Dow App. Cas. 272, 14 R. R. 67, *Burnes v. Pennell*, *sup.* (one of the two "conjoined" actions); and *National Exchange Co. of Glasgow v. Dew* (1855), 2 Macq. H. L. 103.

(*n*) See *Waterhouse v. Jamieson* (1870), L. R. 2 H. L. (Sc.) 29; *Sleigh v. Glasgow and Transvaal Options, Ltd.* (1904), 6 F. 420; and *Gowans v. Dundee Steam Navigation Co.* (1904), 6 F. 613.

(*o*) Extended to Scotland by sect. 1 of the Factors (Scotland) Act, 1890.

(*p*) This section was the subject of *Clydesdale Bank v. J. & G. Paton*, [1896] A. C. 381. The "important exception" referred to in the text is that the signature need not be personal, but may be by an agent. Another difference, pointed out by Lord

1867. was, by sect. 9, expressed not to extend to Scotland, but this was because Scots law, following the Roman, was already in the condition in which the statute provided that it should thereafter be (*g*). On the other hand, Scotland has its own statute law on such matters as the limitation of actions (*r*).

SECT. 4. AS REGARDS PLEADING AND PROCEDURE.

546. The Scots system of pleading, in its present form, is considered by high authority (*s*) to be as superior to the English system, as, in former times, it was deemed inferior (*t*). Whilst English pleading has, since the Judicature Acts, lost that precision which once characterized it, and become prolix and unscientific, the reverse process is to be noted in Scotland (*u*).

547. There is little in common between the Scottish procedure and ours; so that comparison here is out of the question; but one cannot help noticing, with admiration, a particular feature in Scotch practice, viz. the settling of the issues of fact beforehand,—a procedure which is taken from the Roman system, where the Prætor settled the “formula” and set down the questions which the judex was to try, and which, if adopted in this country, would conduce to clearer discrimination between what is law and what is fact, and, above all, would obviate the very human tendency of juries to give general and unjust verdicts on what they conceive to be the moral and sympathetic merits of the case, without regard to specific issues,—verdicts which, if those issues were settled beforehand and put before them, as so settled, for their determination, they would probably not give.

Watson at p. 389 of the report of the above case, is that any representation not complying with the Scotch statute is “to have no effect,” whereas the Act of 1828 merely provides that no action shall be brought thereon. See Ch. X, Sect. 2, Sub-s. (4), *ante*.

(*g*) See Bell’s *Principles*, §§ 130–132, and Ch. XIII, Sect. 2, Sub-s. (2), *ante*.

(*r*) *Ibid.*, §§ 589–604.

(*s*) See the handsome encomium pronounced by Lord HALSBURY, L.C., at pp. 388, 389, of *Clydesdale Bank v. J. & G. Paton*, *sup*.

(*t*) See *National Exchange Co. v. Dew*, *sup*. (*per* Lord BROUGHAM and Lord ST. LEONARDS who could not say anything bad enough of the then Scots pleadings); and *Cullen v. Thompson’s Trustees* (1862), 4 Macq. H. L. 421 (where Lord WESTBURY, L.C., inveighs against the “loose, rambling, and irrelevant statements” which characterized the “condescendence” in that case).

(*u*) See the passage from Lord HALSBURY’s judgment referred to in note (*s*), *sup*.

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